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—Ruarch Associates
MM Docket No. 83-843

Amateur Station, Use of
Memorandum Opinion and Order adopted to redefine "emergency communication" in the Part 97 Amateur Radio Service.
—Amendment of Part 97
MM Docket No. 79-47

AM-FM Duplication
Action eliminates limits on duplication of programming on AM and FM stations that are co-owned in the same local area. (Section 73.242 of the Commission's rules eliminated.) In view of changes in the radio industry and market in recent years, the program duplication rule is no longer necessary.
—Amendment of Sec. 73.242
MM Docket No. 85-357

Review Board granted summary affirmance of Initial Decision in comparative FM broadcast proceeding, which awarded winning applicant substantial preferences under the diversification of media control and ownership integration comparative criteria and gave loser a substantial demerit for proposed AM-FM program duplication. Issue enlargement was denied for failure to establish prima facie case. Petitioner essentially relied on hearsay affidavits by affiants who were neither disinterested nor truly knowledgeable.
—Perry Smith
MM Docket No. 83-1189

AM-FM Relationship
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Application, Dismissal of
Application dismissed as incomplete where applicant failed to submit information required to determine its proposed service contours.
—Royce International B/cing Co.
MM Docket No. 83-65

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—Private Land Mobile Radio Serv.
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(See: Application, Filing — *Private Land Mobile Radio Serv.*)

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—Faye & Richard Tuck, Inc.
MM Docket No. 83-212

Comparative Criteria
Integration credit disallowed where application was a sham structured solely to receive comparative preference and where integration proposal was a variance from original application.
—NEO Broadcasting Company
MM Docket No. 83-1180

Comparative Hearing
Review Board affirms ID which (1) disapproved settlement agreement that was not executed by the winning applicant because a personal guarantee for which it believed it had negotiated was not included in the draft agreement, and (2) granted applicant with preference for diversification of mass media control, ownership participation in management ("integration"), and auxiliary power.
—Agnew-Sacks Broadcasting
MM Docket No. 84-988

Review Board reverses *Supp. I.D.* and disqualifies winner below on staffing and financial issues. ALJ should have denied post-remand amendment to submit wholly new proposals; no staff for 168-hour operation had been proposed. Also, $101,000 no-strings "gift" from brother viewed as probable sham. Remaining FM application granted.
—Pepper Schultz
MM Docket No. 83-1206

Review board summarily affirmed ID's grant to FM applicant with media diversification and ownership integration preferences. No meaningful Sec. 307(b) choice of communities. Exceptors chided for frivolous appeal. Counsels' signature on exceptions certifies to best of their knowledge, information, and belief there are good supporting grounds and exceptions were not interposed for delay, 47 CFR 1.52.
—Warmac Communications, Inc.
MM Docket No. 83-1223

Control, Diversification of
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—*Vactionland B/cing Co.*
BC Docket No. 81-855

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(See: Comparative Hearing — *Pepper Schultz*)

Dismissal of Application, Appeal From, Denied
Review Board denies appeal from ALJ's dismissal of application which had amended its application on B cutoff date to report transfer of 50% of voting control to a new general partner, who was not a party to the original application. No significant offsetting equities which would warrant providing the applicant a final opportunity to eviscerate through amendment its substantial ownership change were present. In Separate Statement, Member Blumenthal raises questions whether "general" partners equity is too small to treat them as having *de facto* control.
—*Tequesta TV, Inc.*
MM Docket No. 85-60

Dismissal of Application, Appeal From, Granted
Review Board grants appeal from and vacates ALJ's order dismissing applications based on his previous denials of leave to amend to specify new transmitter sites. Board found that amendments should have been accepted because loss of previous site was unforeseeable and amendments were otherwise attended by good cause.
—*Mary Ann S. Bohi*
MM docket No. 84-666

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(See: Diligence Lack of — *Pepper Schultz*)

Diversification, of Control of Mass Media,
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—*Daytona B/cing Co., Inc.*
BC Docket No. 81-262

In a comparative FM proceeding, a narrow but decisive preference was awarded to the licensee of a daytime only AM station in the designated community, when the AM station was the only station in the community, and the mutually exclusive applicant owned a UHF ABC affiliate which provided the community and 87.5% of the area and 95.3% of the population within the 1.0 mV/m contour of the proposed FM station with a Grade B signal.
—*J.B. B/cing of Texas, Inc.*
MM Docket No. 83-1273

(See also: Comparative Coverage Issue — *Faye & Richard Tuck, Inc.*)

(See also: AM–FM Duplication — *Perry Smith*)

(See also: Control, Diversification of — *Vactionland B/cing Co.*)

Emergency Communications
(See: Amateur Station, Use of — *Amendment of Part 97*)

Emergency Operations
(See Amateur Station, Use of — *Amendment of Part 97*)

Exchange Carrier Association
This *Report and Order* describes the principles that are applicable to determining the compensation that is to be received by exchange carriers that elect to be compensated under the average schedules, and describes the prohibitions (effective January 1, 1988) that are contained in sections 69.605(c)(1) and 69.605(c)(2) of the Commission's rules.
—*MTS/WATS Market Structure*
CC Docket No. 78-72

Section 69.605(c)(1) prohibits an exchange carrier from receiving compensation under the average schedules if an affiliated exchange carrier receives compensation on the basis of cost data where the combined annual operating revenues of the affiliated exchange carriers are equal to, or greater than, $40.000,000.
—*MTS/WATS Market Structure*
CC Docket No. 78-72

Section 69.605(c)(2) prohibits an exchange carrier, after December 31, 1987, from receiving average schedule compensation if it receives compensation for interstate exchange access services on the basis of cost data.
—*MTS/WATS Market Structure*
CC Docket No. 78-72

FM Station, Authorization
(See: Diligence Lack of — *Pepper Schultz*)

(See also: Comparative Hearing — *Warmac Communications, Inc.*)

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(See: AM–FM Duplication — *Perry Smith*)

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(See: Diversification, of Control of Mass Media — *Daytona B/cing Co., Inc.*)

Obscenity
Commission rules renewal expectancy standard for STV operation is same as for conventional broadcast operation. Commission declines to consider allegations STV operator carried obscene programming and leaves obscenity determinations to local officials in first instance.
—*Video 44, Chicago, Illinios*
MM Docket No. 83-575

Ownership and Management, Integration of
Review Board affirms grant of CP for new TV station to applicant proposing 100% "integration" over competitior credited with 0%. Loser's 75% principal not credited because of failure to provide objective or substantive showing of how he can effecutate, given his deeply embedded interests and executive duties in a multimillion dollar retailing operation. Its 25% principal not credited for want of management and policy functions. Also, Board struck as *ultra vires* the ALJ's specification of transmitter site coordination issues against winner, because *HDO* had fully addressed the factual situation and required a cooperative effort with NOAA and conditioning of the grant on affording adequate interference protection in lieu of specification of issue.
—*Ft. Collins Telecasters*
MM Docket No. 83-777

(See: Diversification, of Control of Mass Media — *Dayton B/cing Co., Inc.*)

(See also: Comparative Coverage Issue — *Faye & Richard Tuck, Inc.*)

(See also: AM-FM Duplication — *Perry Smith*)

Ownership Change, Substantial
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(See: Dismissal of Application, Appeal From, Denied — *Tequesta TV, Inc.*)

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(See: Obscenity — *Video 44, Chicago, Illinois*)

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(See: Agreement, Between Applicants — *Ruarch Associates*)

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(See: Obscenity — *Video 44, Chicago, Illinois*)

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—*Ware Communications, Inc.*

Settlement
(See: Comparative Hearing — *Agnew-Sachs Broadcasting*)

(See: Agreement, Between Applicants — *Ruarch Associates*)

Staff Adequacy
(See: Diligence Lack of — *Pepper Schultz*)

Stay, Denied
(See: Comparative Hearing — *Agnew-Sachs Broadcasting*)

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(See: Obscenity — *Video 44, Chicago, Illinois*)

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(See: Rules, Waiver of, Denied — *Ware Communications, Inc.*)

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(See: Dismissal of Application, Appeal From, Granted — *Mary Ann S. Bohi*)

Transmitter Site, Coordination With Another Federal Agency
(See: Ownership and Management, Integration of — *Ft. Collins Telecasters*)

Comparative Hearing
Settlement

Review Board affirms ID which (1) disapproved settlement agreement that was not executed by the winning applicant because a personal guarantee for which it believed it had negotiated was not included in the draft agreement, and (2) granted applicant with preference for diversification of mass media control, ownership participation in management ("integration"), and auxiliary power.
—*Agnew-Sachs Broadcasting*
MM Docket No. 84-988

FCC 86R-27

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

ROGER AGNEW & JACQUELINE SACHS d/b/a AGNEW-SACHS BROADCASTING Honolulu, Hawaii	MM Docket No. 84-988 File No. BPH-830520AI
GEORGE KIMBLE et al., d/b/a MOANA KAI BROADCASTING ASSOCIATES Honolulu, Hawaii	MM Docket No. 84-989 File No. BPH-830520AP

For Construction Permit
for a New FM Station

Appearances

Harry F. Cole and *Mark A. Kirsch* on behalf of Agnew Sachs Broadcasting; *James L. Oyster* and *Martin L. Leader* on behalf of Moana Kai Broadcasting Associates.

DECISION

Adopted: April 18, 1986; Released: May 8, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL

BOARD CHAIRMAN MARINO:

1. During this comparative hearing to select the best applicant for a new FM broadcast sation in Honolulu, Hawaii, the parties were given ample time to settle the case. When they were unable to execute and file the basic documents required by the Commission's rules, 47 CFR 73.3525, the trial-type comparative hearing was resumed. Ultimately, Administrative Law Judge Conlin found that Agnew-Sachs Broadcasting was the superior applicant on every relevant and important comparative factor. *Initial Decision* FCC 85D-67, released October 21, 1985. Moana Kai, the remaining competing applicant, asks the Review Board (a) to stay further administrative proceedings so that it can seek enforcement of its rights under an alleged settlement agreement in a United States District Court. Moana also requests (b) reversal of the ALJ's failure to approve the settlement agreement or (c) remand for a further hearing to explore whether Agnew-Sachs "dishonored" the settlement agreement, and other issues found to be unjustified by the ALJ. In a related civil action to enforce the same settlement agreement, U.S. District Court Judge Oberdoerfer held that until our administrative proceedings are finally resolved the settlement controversy was not ripe for adjudication in District Court. *Adams* v. *Agnew*, Civil No. 85-2270, D.C. D.C., filed August 30, 1985. On the record before us Moana Kai has completely failed to justify its request for extraordinary relief based upon the alleged settlement agreement, nor has it shown that the ALJ committed any error in selecting Agnew-Sachs as the superior comparative applicant.

2. *Background*: On the first day of the scheduled comparative hearings, May 7, 1985, Moana Kai, Agnew-Sachs, and Alan Adams, a third comparative applicant, advised the presiding ALJ that they had reached a "settlement in principle" and sought a continuance to prepare and submit the required documents. Several months passed during which the three applicants were unable to execute the required documents. Agnew-Sachs submit-

ted a declaration under penalty of perjury stating that it had refused to sign the relevant documents because of Moana Kai's failure to provide Agnew-Sachs with the personal guarantee of George Kimble, one of Moana's principals, despite the fact that the offer of such a guarantee had been a crucial element underlying Agnew-Sach's willingness to settle. (Opposition to Stay, p. 3, and Attachment A).

3. On July 17, 1985, the comparative hearing was resumed and the presiding ALJ orally denied a joint motion for approval of agreement which had been filed by Alan Adams and Moana Kai, and opposed by Agnew-Sachs. Thereafter, on July 22, the ALJ issued his written ruling, FCC 85M-2895, holding that:

> The motion is based on a settlement agreement that purports to include Agnew-Sachs as one of the parties to the agreement. However, the agreement has not been executed by Agnew-Sachs nor has the supporting documentation required by Section 73.3525 been submitted with respect to that party. In the circumstances the agreement cannot be approved.

4. Alan Adams had petitioned the ALJ to enlarge the issues to ascertain whether Agnew-Sachs had "dishonored the settlement agreement" thus calling into question the fitness of the applicant. On August 5, 1985, the ALJ released a Memorandum Opinion and Order, FCC 85M-3027, denying the request. After reviewing the relevant facts he held that "the crux of the matter is whether a final agreement was ever reached", that under well-settled Commission policy "questions relating to the existence or validity of a contract are best left to the courts", and that such a remedy had already been sought in the U.S. District Court. *Adams* v. *Agnew, supra.* Relying on *GACO Communications Corp.*, 94 FCC 2d 761, 780 (Rev. Bd. 1983), the ALJ also held that the factual allegations of the parties did not reveal abuse of the Commission's processes which would require further evidentiary hearings and possible disqualification of the offending party.

5. As previously noted Adams had also filed a civil suit in the U.S. District Court seeking specific performance of the alleged settlement agreement. On August 27, 1985, Judge Oberdoerfer heard oral argument and after noting the ongoing FCC hearing and the ALJ's refusal to enlarge issues, para. 4 above, dismissed the complaint without prejudice stating: "Until the FCC has reached a final determination on the competing applications and plaintiff [Adams] has exhausted his avenues of appeal within the FCC (and through judicial review of any F.C.C. final decision), the controversy has not ripened to the point where it is justicable in this District Court." *Adams* v. *Agnew, supra.* Recently, U.S.

District Judge Flannery issued an order following this earlier ruling in a related case subsequently filed by Moana Kai's principals. See *George Kimble et al* v. *Alan Adams et at*, No. 85-3828, D.C.D.C. March 26, 1986.

6. The comparative hearing which resumed on July 17, 1985, was completed on the same day and thereafter the ALJ granted the voluntary motion of Adams to dismiss its application, FCC 85M-3632, released September 17, 1985. In the Initial Decision, *supra*, Agnew-Sachs was found to be the superior comparative applicant on both the primary factor of diversification of mass media, ID paras. 25-27, and the substantial factor of integration of ownership and management, ID paras. 28-32. Moana Kai received no preferences leaving little room for doubt that a grant of the application of Agnew-Sachs would better serve the public interest. ID para. 33.

7. *Contentions*: Moana Kai's major point on appeal is that Agnew-Sach reached a settlement agreement calling for the dismissal of the Agnew-Sachs application and the grant of Moana. It therefore urges the Board to stay further administrative proceedings while it seeks to enforce its rights under the settlement agreement in a District Court. In support of this belated request for a stay it cites *Hanover Radio, Inc.*, 91 FCC 2d 849 (Rev. Bd. 1982), and *Ninety-Two Point Seven, Inc.*, 55 RR 2d 697 (1983), which recognized that action to enforce breaches of settlement agreements are subject to the jurisdiction of civil courts. Petition pp. 2-7. In its separate brief and exceptions Moana urges reversal of the ALJ's failure to "approve the settlement agreement announced by Agnew-Sachs and accepted by the other parties to the proceeding," Br. 1-4; or remand of the case for a further hearing "to determine whether Agnew-Sachs ha[s] dishonored the settlement agreement," Br. 4-8. Moana also seeks a remand on the following issues which the ALJ found were unjustified: misrepresentation and failure to report regarding air hazard, Br. 7-10, and family ownership, Br. 10-12; staffing, finances, and real parties in interest, Br. 12-14. Finally, in the last few pages of its brief Moana makes a half-hearted attempt to show that it really is the superior comparative applicant. Br. 14-17.

8. *Discussion*: (a) Moana's very belated and extraordinary request for a stay of these administrative proceedings has not been justified by its showing. In *Hanover, supra*, on which it relies, we did stay further proceedings before the ALJ. There a local state court had ordered specific performance when one of the applicants

attempted to withdraw from a settlement agreement which had been fully executed and filed in that FCC hearing. All of the elements for a stay usually required by the D.C. Circuit and the Commission were established. 91 FCC 2d 950-951. On the crucial public interest factor, the Board noted that "the Commission has previously indicated its view that it will defer to state contract law [decisions] even where the effect of the *lex loci* is to preclude the prosecution of a competing application by a local entity." 91 FCC 2d at 951. The stay in *Hanover* helped to harmonize our proceedings with those of the local state court and to avoid a possible Federal-State conflict. 91 FCC 2d at 952. See also *Raul Santiago Roman*, 38 FCC 290, 295-6 (Rev. Bd. 1965). Here a stay would not harmonize our actions with those of the local court. On the contrary, a stay would not serve the public interest but would needlessly delay final resolution of this proceeding in a situation where the Federal Court has already indicated that final resolution of our comparative hearing is a condition precedent to a civil action to enforce the alleged agreement. See para. 5 *above*.

9. (b) There is no justification for Moana's claim that the ALJ erred in refusing to approve the settlement agreement. Br. 1-3. Commission policy has traditionally firmly favored settlements of comparative cases. *Texas Television, Inc.*, 91 FCC 2d 1043, 1045, reconsidered at 91 FCC 2d 1047 (Rev. Bd. 1982). To facilitate such agreements, Congress has amended the Communications Act to eliminate needless legal obstacles. See *id.*, 91 FCC 2d at 1049. Nevertheless, there are certain minimum statutory requirements which must be complied with before such agreements can be approved by the Commission. Thus, revised Section 311(c)(3) of the Communications Act, now provides that: "The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." 91 FCC 2d at 1049. Section 73.3525 of the Commission's rules sets out the documentation which must be filed before the parties can obtain approval of a settlement. Here the ALJ found that the settlement agreement itself had not been executed by all the parties, nor had they submitted basic documents required by Section 73.3525 to establish compliance with the requirements of Section 311(c)(3) of the Communications Act. Disapproval of the settlement agreement was mandated by the Commission's Rules, and must therefore be affirmed.

10. (c) Similarly, we affirm the ALJ's refusal to conduct a hearing to determine if Agnew-Sachs dishonored the settlement agreement, Moana Br. 4-7. In *Gaco Communications, supra*, 94 FCC 2d at 780, we did indicate that should a substantial showing be made that an applicant "has disingenously announced a settlement agreement for purposes of obstructing a hearing or for extracting better terms from an applicant . . . that abusive party should be disqualified forthwith and absolutely." And recently in *Margaret J. Hanaway*, 59 RR 2d 1296 (Rev. Bd. 1986), in considering the totality of the circumstances in an abuse of process case, we took into account misconduct related to a settlement agreement. Our review of the record in the present case confirms the ALJ's finding that the factual allegations do not indicate any abuse of the Commission's processes. "Rather it seems clear from the affidavits submitted that serious negotiations were undertaken, that obstructing the hearing was not a factor, and that the settlement did not founder because of any attempt to extract better terms, but because of a disagreement regarding the adequacy of a guarantee that the terms would be met." FCC 85M-3027, para. 4.

11. We now reach the comparative aspects of the case. Agnew-Sachs has no attributable ownership interests in broadcast media since Mr. Agnew made a timely pledge to divest himself of his 10% interest in an Albuquerque AM-FM station. ID para. 25. In sum, Moana Kai has attributable interests in seven broadcast facilities in New York, and two in Pennsylvania. ID paras. 25-26. "The force of the demerit" for diversification, the ALJ held, "was somewhat lessened by the great distance between Honolulu," and Moana Kai's distant other broadcast interests. Nonetheless, Agnew-Sachs was entitled to a preference for diversification, the primary comparative factor. ID para. 27. Moana now argues that Agnew-Sachs should have received a substantial demerit on this factor because Mr. Agnew failed to disclose in his original application that his father and family had ownership interests in the station he had pledged to divest. There is no dispute that Agnew made a timely pledge to divest himself of his interest in that station, and has carried out his pledge. Similarly, Moana's attempt to create a real party in interest issue by claiming that Agnew's father is involved in the financial commitment to the present application was correctly rejected because it was based on speculation and surmise. See FCC 85M-4060, paras. 4-5, released October 17, 1985.

12. Moana Kai proposed no participation of ownership in the management of the station, and is therefore entitled to 0% credit on this factor of substantial importance. Both Agnew-Sachs 50% partners proposed to participate in the managmenet of the station; however, because they did not sign their partnership agreement in a timely fashion, Moana urged at the hearing that they were not entitled to 100% or any integration credit. Mindful of our decison in *Houston Family Television, Ltd.*, 58 RR 2d 1557 (Rev. Bd. 1985), after considering the totality of the record evidence, and making specific findings, ID. paras. 28-31, the ALJ held that "the Agnew-Sachs integration proposal does represent a credible, good faith plan that provides reasonable assurance that the integration commitments can be relied on and should be credited." ID para. 31. If it were necessary to reach this issue we would affirm the ALJ's ruling for the reasons set out in his Initial Decision at paras. 28-31. However, as the ALJ correctly recognized, even if Agnew-Sachs received no integration credit, the competing applicants would be equal on this factor. Agnew-Sachs would still be the superior comparative applicant because of its diversification and auxiliary power preferences. ID para. 31, 33. Finally, we reject Moana's remaining arguments, which border on the frivolous, for the reasons set out in the ALJ's rulings. *See* FCC 85M-4060, *supra*; FCC 85M-1869, released April 26, 1985.

13. ACCORDINGLY, IT IS ORDERED that the petition for stay of proceeding and other extraordinary relief, filed by Moana Kai Broadcasting Associates November 20, 1985, IS DENIED; that Moana Kai's petition for leave to amend filed November 11, 1985, and January 6, 1986, ARE GRANTED; that the petition for leave to amend filed by Agnew-Sachs Broadcasting on December 2, 1985, January 14, 1986, and April 2, 1986, ARE GRANTED; that the application of Moana Kai IS DENIED; and that the application of Agnew-Sachs Broadcasting (BPH-8302520AI) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH A. MARINO, *Chairman, Review Board*

FCC 85D-67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
ROGER AGNEW & JACQUELINE SACHS d/b/a AGNEW-SACHS BROADCASTING Honolulu, Hawaii	MM DOCKET NO. 84-988 File No. BPH-830520AI
GEORGE KIMBLE et al., d/b/a MOANA KAI BROADCASTING ASSOCIATES Honolulu, Hawaii	MM DOCKET NO. 84-989 File No. BPH-830520AP
For Construction Permit for a New FM Station	

Appearances

Harry F. Cole and *Mark A. Kirsch* on behalf of Roger Agnew and Jacqueline Sachs d/b/a Agnew Sachs Broadcasting; *James L. Oyster* on behalf of George Kimble *et al.*, d/b/a Moana Kai Broadcasting Associates; and *Larry A. Miller*, on behalf of Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

Issued: October 17, 1985; Released: October 21, 1985

Preliminary Statement

1. On May 20, 1983, Roger Agnew and Jacqueline Sachs d/b/a Agnew-Sachs Broadcasting (Agnew-Sachs), and George Kimble *et al.*, d/b/a Moana Kai Broadcasting Associates (Moana Kai) filed mutually exclusive applications for a construction permit for a new FM broadcast station on Channel 258C in Honolulu, Hawaii. By *Order*, released October 31, 1984, the applications and three others were designated for hearing. During the course of the

proceeding those three were dismissed leaving only Agnew-Sachs and Moana Kai.[1] The designated issues applicable to these parties were the following:

(1) If a final environmental impact statement is issued with respect to Moana Kai which concludes that the proposed facilities are likely to have an adverse effect on the quality of the environment,

(a) to determine whether the proposal is consistent with the National Environmental Policy Act as implemented by Sections 1.1301-1319 of the Commission's rules; and

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is qualified to construct and operate as proposed.

(2) To determine whether there is a reasonable possibility that the tower heights and locations proposed by Agnew-Sachs, and Moana Kai would constitute a hazard to air navigation.

(3) To determine which of the proposals would, on a comparative basis, best serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. The environmental impact issue was mooted by an amendment to the Moana Kai application, accepted by *Order*, FCC 84M-5299, released December 20, 1984. The air hazard issue relative to Agnew-Sachs and Moana Kai was summarily resolved in the applicants' favor. *Orders*, FCC 85M-2305, released May 31, 1985; and 85M-2896, released July 22, 1985. Thus, only the comparative issue remained to be tried.

3. A prehearing conference was held on January 4, 1985, and the evidentiary hearing session was held on July 17, 1985.[2] The record was closed on August 1, 1985; proposed findings of fact and conclusions of law were filed on September 9, 1985; and replies thereto were submitted on September 23.

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[1] The three dismissed applicants were Kenneth S. Hayashi, Guy Erway, Jr. and Alan Adams. See *Orders*, FCC 85M-002, released January 4, 1985; FCC 85M-504, released February 1, 1985; and FCC 85M-3632, released September 17, 1985.

[2] The Presiding Judge convened hearing sessions on May 7 and May 8, 1985. However, due to the then-pending settlement discussions, no evidence on the designated issues was introduced (although matters relating to the air hazard issue were discussed). When it became apparent that a settlement would not come to fruition, the hearing was set for July 17, 1985. *See Order*, FCC 85M-2687, released July 3, 1985.

Findings of Fact

Agnew-Sachs

4. Agnew-Sachs is a Hawaii general partnership. Originally established by oral agreement between its two principals, Roger Agnew (50%) and Jacqueline Sachs (50%), the partnership agreement was reduced to writing and executed on January 18, 1985. As set forth in the partnership agreement, Mr. Agnew and Ms. Sachs are each committed to paying his or her respective pro rata share of the applicant's expenses. A written agreement had been prepared just prior to the October 3, 1983 "B" cut-off date but was not executed at the time because the partners decided to proceed on the basis of their oral understanding.[3] When present counsel suggested that the agreement be reduced to writing, the original document, slightly revised, was formally executed. Agnew-Sachs Ex. 3; Tr. 104, 111–117.

5. The record reflects that both Mr. Agnew and Ms. Sachs have participated in the establishment and operation of the partnership, and in the preparation, research, and prosecution of the appliction. Tr. 103–104, 115–123, 129–130, 142–145. Specifically, both Mr. Agnew and Ms. Sachs travelled to Hawaii, Tr. 103; researched the Honolulu radio market, Tr. 103–104; discussed programming, tower sites and studio sites, Tr. 120–122, 129–130; secured financing, Tr. 126; had meetings and consulted with engineers and other radio management personnel, Tr. 123; prepared and filed the Agnew-Sachs application, Tr. 104, 143–144; and were active in the prosecution of the application through and including the hearing phase herein.

6. *Diversification of Control of Media of Mass Communication.* Agnew-Sachs has no interest in any medium of mass communications. At the time of filing the Agnew-Sachs' application, Roger Agnew had a 10% ownership interest in Gensco, Inc., the sole stockholder of KFMG, Inc., licensee of radio stations KAMX(AM) and KFMG(FM), Albuquerque, New Mexico.[4] Mr. Agnew was also a director of Gensco, Inc. Agnew-Sachs Ex. 1, p. 3; Tr 109. As part of the Agnew-Sachs' application, filed on May 20, 1983, Mr. Agnew made a timely (*i.e.*, prior to the October 3, 1983 "B"

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[3] According to Mr. Agnew, the partners saw no need to execute the agreement because they had known each other a long time and had trust in one another. Tr. 115.

[4] Mr. Agnew's father, mother, and two brothers held ownership interests in Gensco, Inc., which, in the aggregate, amounted to 40% of Gensco, Inc.'s stock. Tr. 98–100.

cut-off date in this proceeding) commitment to divest himself of all of his interest in Gensco, Inc., KFMG, Inc., and Stations KAMX(AM) and KFMG(FM) should Agnew-Sachs be awarded the construction permit for the Honolulu FM station. At the time of the hearing, the stations in question were in the process of being sold.[5] Ms. Sachs has no interest in any medium of mass communications.

7. *Integration of Ownership with Management.* Mr. Agnew will work full-time (minimum 40 hours per week) at the proposed station as general manager. His responsibilities will include the development of all program content for the station and the direct supervision of the employees of the station. Mr. Agnew will be responsible for implementation of the station's EEO program. In order to fulfill his commitment to work full-time, Mr. Agnew will cease his present business activities (consisting primarily of independent consulting work), and will move to Honolulu to live and work there. Agnew-Sachs Ex. 1, p. 3.

8. Ms. Sachs will work full-time (minimum 40 hours per week) at the proposed station as operations manager. Her duties will include the establishment of fiscal policies and procedures for the station and the implementation and management of those policies through the supervision of the billing, collections, and programming budget. She will also act as a liaison between the station and the Honolulu community in an effort to provide responsive public affairs programming. Ms. Sachs intends to terminate her employment in San Diego, and move to Honolulu in the event of a grant. Agnew-Sachs Ex. 1, pp. 2–3.

9. Mr. Agnew has been involved in the broadcast industry since 1968, when he began working as an on-air announcer at KFMQ(FM), Lincoln, Nebraska. He attended the Brown Institute of Broadcasting in Minneapolis, Minnesota from July 1969 until April 1970. During that time he worked as a part-time announcer at radio stations WMIN(AM) and KEEY(FM), Minneapolis. From April 1970 until May 1973, Mr. Agnew worked again at KFMQ(FM), serving at various times as announcer, program director, sales manager, and operations manager. From September

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[5] As reflected in the Agnew-Sachs Petition for Leave to Amend and Amendment, filed on July 15, 1985, the applications for the assignment of licenses of Stations KAMX(AM) and KFMG(FM) (FCC File Nos. BAL–850508EQ and BALH–850508ER), were granted on June 19, 1985; and (2) as reflected in a notification filed with the Commission on August 29, 1985, the sale of those stations was consummated on August 27, 1985. As a result, KFMG, Inc., is no longer licensee of KAMX(AM) and KFMG(FM), and Mr. Agnew no longer has any direct or indirect interest in either of those stations. (Official notice taken.)

1973 until December 1978, he provided consulting services to radio stations in the fields of marketing and programming. Agnew-Sachs Ex. 1, pp. 1–2.

10. In January 1978, Mr. Agnew became associated with the principals of a corporation-to-be-formed, called Gensco, Inc., and acted as their agent for the purpose of acquiring radio station KAMX(AM) and the construction permit for KFMG(FM), both located in Albuquerque, New Mexico. He became a 10% owner and director of Gensco, Inc., which is the sole stockholder of KFMG, Inc., the licensee of the two stations. Mr. Agnew was general manager of the two stations until October 1979. As general manager, he directed the reconstruction of KAMX(AM) and the construction of KFMG(FM). Agnew-Sachs Ex. 1, p. 3; Tr. 82, 109.

11. Since October 1979, Mr. Agnew has served as a consultant, advising clients with respect to radio station management, marketing, research and programming.

12. Jacqueline Sachs is a Hispanic female.[6] She was born in 1959 in Bridgeport, Connecticut. After graduating from college in 1980, she worked part-time performing market research for Stations KISO(AM) and KLOZ(FM), El Paso, Texas. From September 1981 until February 1983, she was a research coordinator for radio stations KROD(AM) and KLAQ(FM), El Paso. While employed as a market researcher she also held a position as sales and public relations representative for the El Paso Convention & Tourist Bureau. From June 1983 until the present, Ms. Sachs has been employed in the San Diego, California, area. Agnew-Sachs Ex. 2, p. 2.

13. *Auxiliary Power*. Agnew-Sachs proposes to install auxiliary power equipment at its proposed transmitter site in order that it may assure continuous operation of the station in the event of a power outage or black out, or a similar type of emergency situation. Agnew-Sachs Ex. 4; Tr. 118–119.

14. *Comparative Coverage*. The only evidence submitted on areas and populations served by the respective proposals is Agnew-Sachs Ex. 5, which shows Moana Kai servicing an estimated 750,974 people and Agnew-Sachs 736,136. Moana Kai is

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[6] Ms. Sachs' mother, born and raised in Mexico, is Mexican. Ms. Sachs' maternal grandparents were also born and raised in Mexico. Tr. 138, 148–149. Ms. Sachs' father, while born in Germany, lived there only for a brief period. Tr. 138, 147. He lived in South America for about twenty years prior to coming to the United States. Tr. 148. Ms. Sachs learned to speak Spanish in her home, as that was the language spoken by both of her parents. Ms. Sachs considers Spanish to be her primary language. Tr. 148.

shown to serve an estimated 98.6% of the population of Oahu and Agnew-Sachs 94.6%. There are presently 18 AM stations and 8 FM stations authorized to serve the island (which is about 44 miles long and 30 miles wide) and two additional construction permits are outstanding. The engineering study concludes that the differences in the applicants' predicted 60 dBu contours would be "extremely unlikely to affect a single person not presently served by a multitude of existing stations."

Moana Kai

15. George Kimble *et al.*, d/b/a Moana Kai Broadcasting Associates, is a general partnership, composed of George W. Kimble, Craig L. Fox, Alan Gerry, and Russell Kimble, each of whom owns a 25% general partnership interest in the applicant.

16. *Diversification of Control of Media of Mass Communication.* Moana Kai does not itself have any other interests in mass media. However, the principals of Moana Kai do have cognizable interests in mass media which are attributable to Moana Kai. Each of the four partners in Moana Kai has ownership interests in corporations or parterships which are licensees or permittees of television and radio stations in New York and Pennsylvania.

17. George W. Kimble has the following ownership interests:

(a) 34.6% general partner in Scranton TV Partners, Ltd., permittee of television Channel 38, WOLF-TV, Scranton, Pennsylvania, and permittee of television Channel 56, WWLF-TV, Hazleton, Pennsylvania;

(b) 15% stockholder and President of AGK Communications, Inc., licensee of WAQX-FM, Manlius, New York, and licensee of FM Translator W269AF, Chittenango, New York;

(c) 15% stockholder and President of WOLF Radio, Inc., licensee of WAQX, Syracuse, New York;

(d) 25% general partner of Canton Broadcasting Associates, permittee of WYHV-AM, Canton, New York;

(e) 33 1/3% general partner of Jamestown TV Associates, permittee of WNOD-TV, Jamestown, New York; and

(f) 25% stockholder and President of Kimmanger Communications, Inc., licensee of WQNY-FM, Ithaca, New York.

18. Craig L. Fox has the following ownership interests:

(a) 18.5% general partner of Scranton TV partners, Ltd.;

(b) 23% stockholder and Vice President of AGK Communications, Inc.;

(c) 23% stockholder and Vice President of WOLF Radio, Inc.;

(d) 30% general partner of Canton Broadcasting Associates;

(e) 33 1/3% general partner of Jamestown TV Associates;

(f) 38% general partner of Ithaca TV Associates, successful applicant for construction permit for Channel 52, Ithaca, New York;[7] and

(g) 33 1/3% general partner in Mohawk Valley Broadcasting Associates, permittee of WTUV-TV, Utica, New York.

19. Alan Gerry has the following ownership interests:

(a) 47% stockholder and Treasurer of AGK Communications, Inc.;

(b) 47% stockholder and Treasurer of WOLF Radio, Inc.;

(c) 30% general partner of Canton Broadcasting Associates;

(d) 50% stockholder and Treasurer of Kimmanger Communications, Inc.

20. Russell Kimble has the following ownership interests:

(a) 15% stockholder and Secretary of AGK Communications, Inc.;

(b) 15% stockholder and Secretary of WOLF Radio, Inc.;

(c) 15% general partner of Canton Broadcasting Associates;

(d) 33 1/3% general partner of Jamestown TV Associates;

(e) 25% stockholder and Vice President of Kimmanger Communications, Inc.

21. Summing up the foregoing data, Moana Kai's principals hold substantial or controlling ownership in the licensees of one AM radio station, two FM radio stations, and one FM Translator. Additionally, Moana Kai's principals hold substantial or controlling interests in five television construction permits and one AM radio construction permit. The following percentages represent the aggregate ownership interests attributable to Moana Kai's principals and, thus, to Moana Kai:

100% in WOLF Radio, Inc., licensee of WAQX, Syracuse, New York;

100% in AGK Communications, Inc., licensee of WAQX-FM, Manlius, New York, and licensee of FM Translator W269AF, Chittenango, New York;

100% in Kimmanger Communications, Inc., licensee of WQNY-FM, Ithaca, New York;

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[7] See FCC 85R-57, released July 16, 1985.

> 53.1% in Scranton TV Partners, permittee of television Channels 38, WOLF-TV, Scranton, Pennsylvania;
>
> 53.1% in Scranton TV Partners, permittee of television Channels 38, WWLF-TV, Hazleton, Pennsylvania;
>
> 100% in Jamestown TV Associates, permittee of WNOD-TV, Jamestown, New York;
>
> 38% in Ithaca TV Associates, successful applicant for a new TV station, Channel 52, Ithaca, New York;
>
> 33 1/3% in Mohawk Valley Broadcasting Associates, permittee of WTUV-TV, Utica, New York; and
>
> 100% general partner of Canton Broadcasting Associates, permittee of WYHV-AM, Canton, New York;

Moana Kai Ex. 1, pp. 2–4. Moana Kai's principals have made no committment to divest any of these various interests in the event that Moana Kai's application is granted.

22. *Integration of ownership with management.* Moana Kai does not propose that any of its principals will work full or parttime at the proposed station.

23. *Auxiliary Power*. Moana Kai does not propose to have auxiliary power facilities to be used in the event of interruption of the station's normal electrical power supply.

Conclusions

24. The Commission's process of awarding construction permits to one of several mutually exclusive applicants competing for a new broadcast facility involves the evaluation of the respective proposals under the dual policies of "maximum diffusion of control of mass communication media" and "best practicable service to the public." *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) ("*Policy Statement*"). Diversification is of primary importance, while best practicable service — a composite factor including several sub-elements such as comparative coverage and integration of management with ownership — is of somewhat lesser significance. *Id., see also CJL Broadcasting, Inc.*, 95 FCC 2d 544 (1983). In the comparative analysis that follows, Agnew-Sachs is clearly superior under the first of these elements and is no worse than equal under the second.

Diversification of Control of Media of Mass Communications

25. Agnew-Sachs has no ownership interests in mass communications media. The only such interest arguably attributable to Agnew-Sachs is Mr. Agnew's 10 percent interest in Gensco, Inc., sole stockholder of KFMG, Inc., licensee of KAMX(AM) and KFMG(FM), Albuquerque, New Mexico. However, Mr. Agnew made a timely commitment to divest himself of that interest, and the Hearing Designation Order provided that a grant of the construction permit to Agnew-Sachs would be conditioned on such divestiture. Since the divestiture commitment was timely, no ownership interest is attributable to Agnew-Sachs. *See High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 432 (Rev. Bd. 1983).[8]

26. Moana Kai, through the interests of its principals, must be attributed complete ownership (100 percent) of one AM radio station (WAQX, Syracuse, New York), two FM radio stations (WAQX–FM, Manlius, New York, and WQNY–FM, Ithaca, New York), one FM translator station (W269AF, Chittenango, New York), one construction permit for a new television station (WNOD–TV, Jamestown, New York), and one construction permit for a new AM radio station (WYHV–AM, Canton, New York). Moana Kai also has attributable interests of 53.1 percent in the construction permit for a new television station (Channel 38, WOLF–TV) in Scranton, Pennsylvania, 53.1% in the construction permit for a new television station (Channel 56, WWLF–TV) in Hazleton, Pennsylvania, 33 1/3% in the construction permit of a new television station (WTUV–TV) in Utica, New York, and 38% in the successful applicant for a new television station (Channel 52) in Ithaca, New York. Because of these substantial interests in numerous other broadcast facilities, Moana Kai is subject to a demerit under the diversification criterion.

27. The force of the demerit is somewhat lessened by the great distance between Honolulu, the city of license in this proceeding, and the communities in which Moana Kai's principals have media ownership interests. Nonetheless, the difference between the applicants in this area of comparison remains a sizeable one and Agnew-Sachs is entitled to a preference under the diversification standard. *Policy Statement,* 1 FCC 2d 394–395; *see also CJL*

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[8] Moreover, a condition requiring divestiture is no longer necessary. The applications for consent to the assignment of the licenses of the two stations have been granted by the Commission, and the sale has been consummated by the parties. Therefore, the divestiture has already been effectuated. See n. 5 *supra.*

Broadcasting, supra at 549; *Snake River Valley Television,* 26 FCC 2d 380, (Rev. Bd. 1970).

Integration of Ownership and Management

28. Moana Kai proposes no integration of its principals in the management of the station and is therefore entitled to no integration credit. Agnew-Sachs proposes the full-time participation of Mr. Agnew and Ms. Sachs in station management, and thus on the face of it that applicant warrants a substantial integration preference.

29. Moana Kai contends, however, that Agnew-Sachs integration cannot be credited since the principals did not sign their partnership agreement in a timely fashion. In support it cites *Houston Family Television, Ltd.*, FCC 85R-56, released July 10, 1985, which held (para. 11) that "oral understandings, stock options, and other inchoate ownership arrangments, until finalized, simply do not provide the type of 'reasonable assurance' that [is required] as an underpinning for ownership integration credit."

30. Agnew and Sachs had a partnership agreement prepared in the fall of 1983, just prior to the "B" Cut-off date but did not execute it. On the recommendation of present counsel they signed the document (with some revisions) on January 18, 1985. This was four days after the applicants submitted their proposed integration statements to the presiding officer. The latter date, in this case January 14, 1985, is, according to the Review Board's *Houston Family* decision, "critical" in evaluating an applicant's integration proposal. Thus if the unexecuted partnership agreement is the kind of oral understanding or inchoate arrangment referred to in *Houston Family*, then Agnew-Sachs' integration would seem to lack the "reasonable assurance" that would provide the proposal with credibility.

31. Agnew-Sachs argues that several other factors compensate for its failure to timely execute the agreement and demonstrated the credibility and bona fides of the proposal: the long term in depth involvement of the principals in the prosecution of the application; their sworn testimony as to their commitment to the enterprise; the liability of general partners for obligations incurred as opposed to the limited liability of the corporate stockholders in *Houston Family*; and the absence of "gamesmanship" in the proposal, i.e. Ms. Sachs, though entitled to preferences for minority status and (at the time the proposal was made) gender was not assigned a majority interest. All of these factors persuade the presiding officer that in terms of the totality of the record

evidence the Agnew-Sachs integration proposal does represent a credible, good faith plan that provides reasonable assurance that the integration commitments can be relied on and should be credited. If, on the other hand, the Board intended timely execution of a general partnership agreement (before integration statements are exchanged) to be a *sine qua non* for achieving integration credit, this is a case where disallowing the claimed integration would not change the outcome. Agnew-Sachs would be equal to Moana Kai, which claims no integration credit; it has been awarded a preference for diversification; and the lesser factors which remain to be considered give no advantage to Moana Kai.

Auxiliary Power

32. Of the two applicants only Agnew-Sachs proposes auxiliary power. For this it is entitled to a very slight preference.

Comparative Coverage

Moana Kai proposes to serve approximately 15,000 more people than Agnew-Sachs (750,974 v. 736, 136). There is no evidence that any of this population resides in underserved areas, and in view of the number of aural services on Oahu (26), the small size of the island, and other evidence of record, it can only be concluded that there is an abundance of service available to the population which both applicants would serve. No preference is warranted.

33. In sum, Moana Kai has received no preference while Agnew-Sachs has been preferred for diversification, integration of ownership and management and auxiliary power. The public interest therefore would be better served by a grant of the Agnew-Sachs application.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Agnew-Sachs Broadcasting IS GRANTED and the application of Moana Kai Broadcasting Associates IS DENIED.[9]

FEDERAL COMMUNICATIONS COMMISSION

JOHN H. CONLIN, *Administrative Law Judge*

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[9] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to section 1.276(d).

Amateur Station, Use of
Emergency Communications
Emergency Operations
Rebroadcasts

Memorandum Opinion and Order adopted to redefine "emergency communication" in the Part 97 Amateur Radio Service. —*Amendment of Part 97*
BC Docket No. 79-47

FCC 86-159

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

Amendment of Parts 73 and 97 of the Commission's Rules Concerning Rebroadcasts of Transmissions of Non-broadcast Radio Stations.	BC Docket No. 79-47 RM-2830

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

Adopted: April 2, 1986; Released: April 11, 1986

BY THE COMMISSION:

1. In this proceeding we have revised our rules concerning rebroadcast of non-broadcast radio transmissions to eliminate unnecessary restrictions and administrative procedures and to conform them to new provisions of the Communications Act of 1934, as amended. We also revised our amateur rules to emphasize the separation between the Amateur service and the broadcast services.[1]

2. We received two petitions for reconsideration, both having to do with the revisions we made to the amateur rules. The American Radio Relay League, Incorporated (ARRL) filed a

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[1] *Report and Order*, 50 FR 25241, June 18, 1985.

Petition for Partial Reconsideration which sought to reinstate the former definition of "emergency communication" in Section 97.3(w) of the amateur rules. David B. Popkin filed a Petition for Reconsideration which sought several modifications to the adopted amateur rules. Responses to these Petitions for Reconsideration were filed by Frederick G. Roberts and jointly by the National Association of Broadcasters (NAB) and the Radio-Television News Directors Association (RTNDA).

3. Popkin claimed that failure to use the word "automatically" before "retransmit" in Section 97.113(c) resulted in the prohibition of certain formerly permissible manual retransmissions. However, these retransmissions were prohibited under the old rules and continue to be prohibited under the new rules. As we stated in the *Report and Order, supra,* at paragraph 24, ". . . we have never construed the word 'automatic' in section 97.113 to legitimize the practice of holding an amateur microphone to a non-amateur receiver." Popkin raises no new issue of fact or law related to this matter.

4. Popkin also alleged that there is a conflict between the amateur rules and the broadcast rules, because: "If an amateur station may *never* be used for any activity related to broadcast program production or news gathering, then there *never* can be any way that a broadcast station can rebroadcast a message originated by an amateur station." He proposed to resolve this perceived conflict by inserting the word "directly" before the phrase "related to program production" in Section 97.113(b). Such a change is not necessary. The two sets of rules are not in conflict. Neither amateur operators nor broadcast stations may use amateur radio as a production or news gathering tool, but broadcast stations may retransmit normal amateur communications for whatever purpose they wish. An example of a permissible retransmission would be a program about the Amateur service wherein message exchanges between amateur stations were incidental to the story. Another would be the retransmission of a message exchange between amateur stations taken off the air where no prior arrangements for broadcasting were made.

5. Popkin's other concerns, and those of the ARRL, NAB-RTNDA and Roberts, relate to the use of amateur radio for emergency communications. In the *Report and Order, supra,* we redefined "emergency communication" in Section 97.3(w) of the rules. We replaced the previous definition (any amateur radio communication directly relating to the immediate safety of life of individuals or the immediate protection of property) with a new

definition akin to the traditional SOS distress signal (a non-directed request for help or a distress signal directly relating to the immediate safety of human life or the immediate protection of property). The ARRL sought a return to the old definition or, alternatively, to a revised definition such as "any amateur radio communication, the purpose of which is the immediate protection of the safety of human life or property." The ARRL sought this relief on the basis that "the new definition is overly specific, and would prohibit entire categories of public service communcations permitted under the prior definition." Popkin concurred but would remove the word "non-directed" from the definition of "emergency communication" and insert the word "directly" before "related to program production" in Section 97.113(b).

6. We are concerned that the new definition may have made an unintended change in the nature of permissible amateur emergency communications. In order to resolve any ambiguity on this point, we rescind the new definition of "emergency communication" adopted in the *Report and Order, supra*, and revert to the previous definition.

7. Popkin sought on reconsideration insertion of the phrase "except for emergency communications" at the end of Section 97.113(b). He argued that this would codify the discussion in paragraph 22 of the *Report and Order, supra.*[2] We disagree. Activities related to program production and news gathering may involve a wide variety of business-related activities, from live interviews to ordering equipment and even arranging accommodations. We determined to maintain an absolute ban on communications of this sort from the Amateur service as inconsistent with its nature and purpose. Thus we did not include the phrase "except for emergency communications" in Section 97.113(b) in the *Report and Order* and we decline to do so now.

8. The discussion in paragraph 22 of the *Report and Order, supra,* related to *conveying news information*. We said it could be done on amateur radio only when all of these conditions are met: (1) the event is unforeseen; (2) the news information is *directly related* to the event; (3) the event involves the safety of human life or the immediate protection of property; and (4) the news information cannot be transmitted by any means other than amateur radio because of the remote location of the originating

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[2] Section 97.113(b) contains a flat ban on the use of amateur radio for broadcast news gathering or production. Paragraph 22 intepreted this rule in the context of conveying news information in an unforeseen emergency when there are no alternative means of communications.

transmission or because normal communications have been disrupted. These standards are not to be construed liberally, but literally. Thus, if alternate communications facilities are available amateur radio may not to be used to convey news information, even if the other elements are present.

9. The NAB-RTNDA response to the Petitions for Reconsideration urged adoption of the position NAB and RTNDA took in their comments, i.e., to increase the scope of permitted broadcast use of amateur radio in broadly defined emergency situations, and to do so clearly in the rules rather than by *dicta* in the *Report and Order, supra.* NAB and RTNDA raise no new issues, and therefore we do not in this document revisit these issues except to clarify our decision as stated above.

10. ACCORDINGLY, IT IS ORDERED that the Petition for Partial Reconsideration filed by the American Radio Relay League IS GRANTED IN PART consistent with this *Memorandum Opinion and Order.*

11. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by David P. Popkin IS GRANTED IN PART consistent with this *Memorandum Opinion and Order.*

12. IT IS FURTHER ORDERED that paragraph (w) of Section 97.3 of the Commission's rules is amended as set forth in the attached Appendix, effective June 20, 1986.

13. The rule change adopted herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

14. In accordance with section 605 of the Regulatory Flexibility Act of 1980 (5 U.S.C. § 605), we certify that this rule change does not have a significant impact on a substantial number of small entities, because it merely reverts to the former definition of "emergency communication" and because these entities may not use the Amateur Radio Service for commercial radio communication. (See 47 CFR § 97.3(b)).

15. These actions are taken pursuant to Section 1.429 of the Commission's rules (47 CFR § 1.429) and Sections 4(i) and 303(r) of the Communications Act of 1934, as amended (47 U.S.C. §§ 154(i) and 303(r)).

16. IT IS FURTHER ORDERED that this proceeding is terminated.

17. For further information about this document contact John J. Borkowski, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 97 continues to read: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609, unless otherwise noted.
2. Paragraph (w) of Section 97.3 is revised to read:

§ 97.3. Definitions.

* * * * *

(w) *Emergency communication.* Any amateur radio communication directly relating to the immediate safety of life of individuals or the immediate protection of property.

* * * * *

AM-FM Duplication
AM-FM Relationship

Action eliminates limits on duplication of programming on AM and FM stations that are co-owned in the same local area. (Secion 73.242 of the Commission's rules eliminated.) In view of changes in the radio industry and market in recent years, the program duplication rule is no longer necessary. —*Amendment of Sec. 73.242*

MM Docket No. 85-357

FCC 86-132

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 73.242 of the Commission's Rules and Regulations in Regard to AM-FM Program Duplication	MM Docket No. 85-357 RM-5076

REPORT AND ORDER

(Proceeding Terminated)

Adopted: March 26, 1986; Released: April 4, 1986

BY THE COMMISSION:

Introduction

1. By this action, the Commission is eliminating Section 73.242 of its rules which limits duplication of programming on AM and FM stations that are co-owned in the same local area. On the basis of the record in this proceeding and its own experience in this area, the Commission has determined that the program duplication rule is no longer necessary. This action is expected to foster expanded radio hours of operation and, thereby, to promote improved radio service to the public. This action also provides licensees of AM-FM combinations with full discretion to make decisions concerning program duplication in accordance with market forces.

Background

2. Section 73.242 of the Commission's rules currently specifies that if either station of an AM-FM combination is licensed to a community of more than 25,000 population, the FM station may not devote more than 25 percent of the average program week to duplicated programming.[1] Stations in communities with less than 25,000 population are not subject to program duplication limits.

3. The Commission first adopted program duplication limits in 1964, in the *Report and Order* in Docket No. 15084.[2] Section 73.242, as originally promulgated, prohibited FM stations from duplicating more than 50 percent of their programming from a co-owned AM station in the same local area. In adopting this rule, the Commission sought to further two objectives. The first was to foster development of the FM service. To achieve this goal, the Commission believed it was necessary for FM stations to offer programming that was separate from that of co-owned, co-located AM stations. The Commission also believed that increased separate programming of FM stations would encourage consumers to buy and use FM receivers. The second objective was to reduce the inefficiency with respect to spectrum usage that results from duplication of the same programming on two co-located radio stations.[3]

4. In 1974, the Commission observed that there had been increases in the number of independent FM stations, the revenues of FM stations, and the number of FM receivers. In view of these developments, the Commission initiated a new proceeding, Docket No. 20016, to consider updating Section 73.242. In the 1976 *Report and Order* in that proceeding, the Commission strengthened the rule and widened its application.[4] The new rule limited the FM station of an AM-FM combination to not more than 25 percent duplication if either station served a community of more than 25,000 population. No substantive change has been made to the rule since the 1976 *Report and Order*.

5. On June 13, 1985, AGK Communications, Inc. (AGK) filed a Petition for Rule Making requesting that the Commission exempt the late night period, midnight to 6 a.m., from the calculation of

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[1] Section 73.242 defines duplicated programming as "the simultaneous broadcasting of a particular program over both the AM and FM stations or the broadcasting of a particular program by one station within 24 hours before or after the identical program is broadcast over the other station." *See*, 47 CFR 73.242.

[2] *See, Report and Order* in Docket No. 15084, 45 FCC 1515 (1964).

[3] *Id.*, at 1531.

[4] *See, Report and Order* in Docket No. 20016, 59 FCC 2d 147 (1976).

time under the program duplication rule. In response to the AGK petition, the Commision adopted a *Notice of Proposed Rule Making* (*Notice*) on November 20, 1985, to consider the AM-FM program duplication matter.[5] In the *Notice*, the Commission proposed to eliminate Section 73.242 in its entirety.

6. Ten parties filed comments and two parties filed reply comments in response to the *Notice*. In addition, a number of parties filed informal comments by letter. A list of the parties filing comments and replies is provided in Appendix A.

Discussion

7. In the *Notice*, the Commission indicated that in view of the significant changes in structure and market conditions that have occurred in the radio industry in recent years, the program duplication rule no longer appears necessary or desirable. The commission observed that there is abundant evidence that FM stations are now fully competitive in the radio industry and that, on this basis, it no longer appears necessary to foster FM development through a requirement for separate programming. The Commission also indicated that the radio industry structure and market conditions are now such that to permit increased program duplication likely would have only minimal effects in terms of spectrum efficiency. It further indicated that to permit licensees to exercise full discretion with respect to program duplication now offers public interest benefits. In particular, the Commission indicated that elimination of the program duplication rule would be expected to result in expanded service from AM-FM combinations. It also observed that elimination of this rule would provide licensees of AM-FM combinations increased flexibility to respond to the current economic conditions faced by the AM service.

8. The majority of the commenting parties support the Commission's proposal to eliminate the program duplication rule. However, two parties, Osborn Communications Corporation (Osborn) and Press Broadcasting Company (Press) oppose any change in the current rule.

9. *FM Development*. The commenting parties addressing the issue of FM development agree that the FM service is now a fully competitive and viable component of the radio industry and that the program duplication rule is no longer necessary for the purpose of promoting an independent FM service. In this regard,

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[5] *See, Notice of Proposed Rule Making* in MM Docket No. 85-357, 50 FR 49863.

commenters point to FM's 70+ percent share of the total listening audience as evidence that FM is now the dominant radio service.[6] Great Trails Broadcasting Corporation (Great Trails) submits that FM's lead in audience share is even more significant because AM stations still outnumber FM stations by 4963 to 4236. Great Trails also notes that the number of FM stations has increased significantly over the years and, in fact, has more than tripled from the approximately 1300 stations that were on the air in 1964, when the program duplication rule was originally adopted.

10. We conclude that the record supports our initial assessment of the development of the FM service as it pertains to the program duplication rule. Accordingly, we find that it is no longer necessary to retain this rule for the purpose of promoting FM development.

11. *Spectrum Efficiency*. In the *Notice*, the Commission indicated that it believed that to permit increased program duplication now would not result in inefficient use of the spectrum. The Commission observed that economic changes in the radio industry have made it less attractive for AM-FM combinations to engage in full-time program duplication. It stated that in cases where the potential audience is of sufficient size and diversity to support separate programming of two stations, market forces can be expected to lead licensees to provide that progamming to reach the maximum number of listeners. By doing so, stations would tend to increase both their revenues and profits. On the other hand, where it is not economically desirable to program combined stations separately, it seems preferable to allow stations to duplicate programming rather than have one of the stations go off the air to comply with the non-duplication requirement and deny service to a portion of the potential audience. The Commission also recognized that the service areas of combined stations often do not fully coincide. If one of the stations in such a combination went off the air as a result of the program duplication limit, some additional listeners would be denied service they might otherwise receive. In view of these considerations the Commission tentatively concluded that elimination of Section 73.242 could be expected to result in increased hours of operation by stations in AM-FM combinations and, thereby, in expanded service from the radio industry.

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[6] In the *Notice*, the Commission indicated that the Spring 1985 RADAR Survey by Statistical Research, Inc. estimates that FM's share of all radio listening (7 days, 24 hours, all persons 12+) is 70.6 percent.

12. Parties supporting elimination of the rule also agree with the Commission's initial assessment that in most instances program duplication is not economically beneficial to AM-FM combinations. In this respect, Great Trails states that the potential audience for a given program format is finite. It explains that a licensee who transmits the same programming on two stations in the same community is merely fragmenting its own audience — with the result that neither of the two stations can achieve the audience levels of which each would be capable if programmed separately. In statements similar to those of AGK in its Petition for Rule Making, KLOK Radio Ltd. (KLOK) comments that market and service considerations will lead AM-FM combinations to offer separate programming where there is sufficient audience to sustain that programming. As an example, KLOK states that in some of the markets in which it operates combined stations there is sufficient audience in the 6 a.m. - 7 p.m. time period to justify separate programming. However, it relates that after 7 p.m. the potential audience in these markets drops to one-third of the daytime level and that it then is not profitable to operate the stations separately.

13. Most of the commenting parties believe that elimination of the program duplication rule would actually improve spectrum efficiency. The consensus of their statements is that the rule inhibits, rather than promotes efficient use of the spectrum. They submit that the rule encourages stations to shut down operation during certain parts of the day in order not to exceed the duplication limit. These parties also agree that elimination of the program duplication limit would lead to expanded operation by those stations that now leave the air to comply with the rule. In this respect, Cox Communications, Inc., *et al.* (Joint Commenters) states that it believes the Commission's interest in promoting separate programming is better served by the marketplace than an inflexible rule. The National Association of Broadcasters (NAB) comments that where the financial capacity of an AM-FM combination cannot support independent programming during the entire period of operation authorized by the FCC, one of the stations, usually the AM, may be forced to operate under a curtailed schedule. The American Legal Foundation (ALF) submits that the restriction on program duplication also is unjustified in view of the increased number of radio stations now available to the public.

14. Commenting parties supporting elimination of the rule also state that there are situations in which it is desirable, from a public interest viewpoint, to engage in program duplication and that such situations highlight the problems with using regulations to supplant the operation of market forces. For example, Great Trails submits that some AM-FM combinations may duplicate in order to be able to provide unique programming.

15. We continue to believe that program duplication limits are no longer necessary to promote the goal of spectrum efficiency. We believe the record on this issue demonstrates that the economic relationships and conditions within the radio industry are now such that market forces tend to direct licensees of AM-FM combinations to program their stations in a manner that is consistent with spectrum efficiency and the interests of radio listeners.[7]

16. *Other Considerations.* In the *Notice*, the Commission noted that many heretofore profitable AM stations are now experiencing economic difficulties as a result of the shift of listeners to FM stations. The Commission stated that in many AM-FM combinations, it now appears that the viability of the AM station may depend on its association with a stronger FM facility. The Commission suggested that elimination of Section 73.242 could facilitate a significant reduction in costs for such marginal AM stations.

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[7] In this context, we note that pursuant to existing policy, a comparative demerit may be assessed against an applicant who engages or intends to engage in, program duplication unless the applicant demonstrates substantial countervailing benefits. *See e.g., Victor Broadcasting v. FCC Jones T. Sudbury*, 8 FCC 2d 360 (1967). The assessment of a demerit was based on the Commission's assumption that program duplication was "inherently wasteful and inefficient." *See Memorandum Opinion and Order* in Docket No. 15084, 45 FCC 2092, 2094 (1965). The record in this proceeding demonstrates that such a presumption is no longer appropriate. As observed previously, the development and growth of the information marketplace in general, and the radio marketplace in particular, has attenuated our concerns with program duplication as it may relate to "wasting" spectrum. We also note that program duplication may have positive economic benefits for certain combined AM stations. Most important, however, is our finding that marketplace forces, and an applicant's decision in response to such incentives, are in this context, a superior mechanism for determining spectrum efficiencies. We also note that the First Amendment concerns expressed *infra* also arise when program duplication issues are raised in the comparative context. In light of these conclusion, we believe it is inconsistent to assume that program duplication is presumptively inefficient and will not do so in the future. *See e.g.*, CJL Broadcasting Inc., 88 FCC 2d 750, 761-762 (1981) (Blumenthal & Marino, concurring).

17. Most of the commenting parties believe that to permit increased program duplication would serve to improve the economic outlook for many AM stations that are part of AM-FM combinations. In statements representative of those supporting elimination of the rule, ALF submits that reducing AM expenses through program duplication may permit marginal AM stations to survive and to continue serving their communities. However, the two parties opposed to elimination of the program duplication rule base their positions on concerns relating to the AM service. Osborn believes the rule should be retained in order to encourage a revitalization of the AM service through the same policy that was applied to the FM service. It argues that if FM programming is simulcast on AM, there will be no need for listeners to tune to AM. Osborn contends that a rule change to permit increased program duplication would cause the collapse of the AM service. Press expresses a different viewpoint in its opposition. It is concerned that increased program duplication will permit marginal AM stations to remain on the air at the expense of independently programmed AM stations that can offer a unique service.

18. While we do not consider program duplication to be desirable as a long term solution to the difficulties confronting the AM service, we recognize that such operation may be appropriate for some AM-FM combinations under the current economic conditions in the radio market. While we do not wish to interfere with normal market forces by adopting regulatory policies specifically to support or maintain the viability of AM stations, we do believe it is incumbent upon us to remove regulations that may unnecessarily impede the ability of AM stations to compete in the radio market. In this respect, we believe the program duplication rule, by constraining possible efficiencies and desirable economic options in particular contexts, imposes an unnecessary artificial restriction on the abilities of licensees of AM-FM combinations to operate their stations in manners that are responsive to market forces. Thus, elimination of Section 73.242 will provide increased flexibility for licensees of AM stations that are part of AM-FM combinations to respond more effectively to economic forces and conditions within the radio industry.

19. A number of the parties supporting elimination of the program duplication rule raise the issue that the current limit on program duplication infringes on their First Amendment rights to free speech and expression. Their general view on this issue is that progamming decisions should be left to broadcasters and should not be determined by the government. In view of the other

considerations discussed above that indicate that the rule need not be retained, we do not believe that it is necessary to determine whether the program duplication rule is an unjustified intrusion on the First Amendment rights of broadcasters. Nonetheless, we are sensitive to such concerns and believe it is appropriate to minimize the impact of our rules on licensee discretion, especially in the area of programming, whenever possible.

Procedural Matters

20. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final regulatory flexibility analysis is:

I. *Need for and purpose of the rule*: The Commission has determined that the AM-FM program duplication rule is no longer necessary to serve its original purposes of promoting FM development and spectrum efficiency. The Commission, therefore, has eliminated this rule. Elimination of the program duplication rule is expected to provide public interest benefits by contributing to expanded radio service and by providing licensees of AM-FM combinations with increased flexibility to respond to market conditions.

II. *Summary of issues raised by public comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result*:

A. *Issues raised*: No issues or concerns were raised in response to the initial regulatory flexibility analysis.

B. *Assessment*: The Commission considers the absence of comments discussing adverse impact of its proposal to eliminate the AM-FM program duplication rule to be indicative of this proposal's lack of potential for negative or harmful effects on small business entities. We believe that elimination of this rule will have a positive effect on licensees of AM-FM combinations by permitting them to expand their sevice and to reduce, where necessary, the cost of their operations.

C. *Changes made as a result of such comments*: None.

III. *Significant alternatives considered and rejected*: The principal alternatives to the proposal to eliminate the AM-FM program duplication rule were: 1) to retain the rule in its current form, or 2) to modify the rule to eliminate the midnight to 6 a.m. time period from the calculation of time under the duplication limit. The Commission determined that the rule no longer serves any regulatory purpose and, therefore, decided to eliminate it in its entirety.

21. Accordingly, IT IS ORDERED, that Part 73 of the Commission's rules IS AMENDED as set forth in Appendix B effective May 12, 1986. In addition, IT IS ORDERED, that this proceeding IS TERMINATED.

22. Authority for this action is provided in Sections 2, 4(i), and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

Parties Filing Comments

1. American Legal Foundation
2. Century Broadcasting Corporation
3. Joint Comments of Cox Communications, Inc., Manning Broadcasting, Inc., Multimedia, Inc., and TETCO, Inc.
4. Great Trails Broadcasting Corporation
5. Joint Comments of KLOK Radio and Voice of the Orange Empire, Inc., Ltd.
6. M–3–X, Inc.
7. National Association of Broadcasters
8. Osborn Communications Corporation
9. Press Broadcasting Company
10. Summit Communications, Inc.

Parties Filing Replies

1. Greater Mansfield Broadcasting Company
2. National Association of Broadcasters

APPENDIX B

Part 73 of Title 47 of the Code of Federal Register is amended as follows:

A. Part 73 - Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.242 is eliminated in its entirety.

Diversification, of Control of Mass Media
Integration of Management and Ownership, See Ownership
Merger and Drop Out Cases

Post-hearing merger applicant receives integration credit based on general partner's original pre-merger proposal. Mass media interests of limited partners will not be considered under diversification criterion if partnership can show that general partners are properly insulated from influence or control of limited partners.

—*Daytona B/cing Co., Inc.*
BC Docket No. 81-262

FCC 86-182

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

DAYTONA BROADCASTING COMPANY, INC. Daytona Beach, Florida	BC DOCKET NO. 81-262 File No. BPCT-800811KE
LIFE STYLE BROADCASTING, INC. Daytona Beach, Florida	BC DOCKET NO. 81-263 File No. BPCT-800811KF
DAYTONA BEACH TELEVISION ASSOCIATES, LTD. Daytona Beach, Florida	BC DOCKET NO. 81-265 File No. BPCT-800811KH

For a Television Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 1986; Released: April 18, 1986

BY THE COMMISSION

1. The Commission has before it: (a) a Petition for Reconsideration of its June 1985 Memorandum Opinion and Order in this proceeding,[1] filed July 22, 1985, by Daytona Beach Television Associates Ltd. (DBTA) and (b) an Opposition to (a) filed August 2, 1985, by Life Style Broadcasting, Inc. (Life Style).

2. This proceeding now involves the mutually exclusive applications of Daytona Broadcasting Company, Inc., Life Style and DBTA for authority to construct a new television station on Channel 26 at Daytona Beach, Florida. In the Memorandum Opinion and Order, *supra*, the Commission modified the Review Board's Decision[2] in this proceeding, but affirmed the Board's grant of Life Style's application. The Commission concurred with the Board's award of preferences to Life Style over its opponents under the diversification of control of mass media and comparative signal coverage criteria. However, it overruled the Board's award of a slight integration preference to DBTA and also awarded Life Style a slight integration preference over the other applications herein.

3. The Commission's June 1985 Order stressed that allowance of the DBTA merger[3] was narrowly based upon the peculiar facts of this case and that the Commission did not intend to create a general policy of allowing applicants to combine their superior characteristics into a merged entity in the manner of a smorgasbord and thus acquire a comparative position superior to that of either the original applicants standing alone. Further, the Commission issued a general warning that, if the merger did not terminate the hearing, it would closely scrutinize any merger among competing applicants after they had been frozen for comparative purposes, in order to prevent any improper upgrading of applications. Hence, the Commission affirmed the Board's

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[1] *Daytona Broadcasting Company, Inc.*, 101 F.C.C. 2d 1010 (1985).

[2] *Daytona Broadcasting Company, Inc.*, 97 F.C.C. 2d 212 (1984).

[3] DBTA is a limited partnership formed by the post-hearing merger of two former applicants in this proceeding; namely, Daytona Beach Family Television, Inc. (Family), and Daytona Beach Television Corp. (Television). Television holds a 60 percent ownership interest in DBTA and is the general partner. Family is the limited partner and holds a 40 percent ownership interest in DBTA. As a result of the merger, Television's application was amended to specify DBTA as the applicant and to subsitute Family's engineering proposal for the one proposed by Television, and Family's application was dismissed.

treatment of the media interests of DBTA, *i.e.*, it treated those interests as if they were previously held by DBTA's general partner (Television) rather than by DBTA's limited partner (Family), since it appeared that to do otherwise would have resulted in comparative upgrading. Following the above rationale, however, the Commission overruled the Board's award of a slight integration preference to DBTA. It explained that, since Family originally proposed no integration and since Family's individual principals could not gain the benefit of Television's integration proposal by virtue of the merger without engaging in comparative upgrading, DBTA should not be awarded any integration credit. Thus, the Commission reasoned that, even though Family is only a limited partner, to give DBTA any credit for integration would permit Family to gain the benefit, through its interest in DBTA, of a relative upgrading of its original integration proposal. The result of the Commission's decision was that Life Style became the only applicant which obtained credit for fulltime integration (7.2 percent), for which it received a slight integration preference over DBTA and DBC.

4. In its Petition for Reconsideration of our June 1985 Order, DBTA contends that it should receive 20 percent integration credit based upon the fact that its general partner, Television has not upgraded its original integration proposal. DBTA claims that a recent Review Board Decision in *Houston Family Television, Ltd.* (*Houston*), 101 FCC 2d 661 (1985), has "cleared the air" concerning the granting of credit for integration proposals in limited partnership applications. DBTA cites *Houston* for the proposition that, in determining whether to award integration credit to limited partnerships such as DBTA, the Commission focuses on the *bona fides* of the relevant partnership's ownership structure and refuses to award integration credit for integrated general partners only when those individuals are found to lack adequate *de facto* ownership or control attributes. DBTA asserts that since there was no challenge to the *bona fides* of its ownership structure, DBTA should receive 20 percent integration credit because its general partner has in no way upgraded its original integration proposal. Such a result is dictated by *Houston*, DBTA submits.

5. We express no views on the applicability of the Board's decision in *Houston*, since that case is pending on appeal before the Commission. Nevertheless, having had the opportunity to revisit our June 1985 order in this proceeding, it appears that we erred in our comparative assessment of DBTA because we

thought that the merger agreement would result in comparative upgrading.[4] As a result, it appears that we may have undermined, to some extent, the Commission's policy applicable to limited partners which provides other public interest benefits, such as encouraging investors to participate as passive partners in broadcast ventures.

6. Having approved the merger agreement by which Family became a limited and therefore totally passive partner, we now believe that DBTA's integration proposal should be treated in accordance with the Commission's treatment of similar integration proposals of limited partnerships formed before the relevant Rules. *See Anax Broadcasting, Inc.*, 87 F.C.C. 2d 483, 488 (1981). Thus, we shall credit DBTA with Television's 20 percent integration proposal as if Television were an individual applicant. We are taking this approach because the other applicants in this proceeding, namely Life Style and DBC, will not be prejudiced by this treatment of DBTA, since Television, DBTA's general partner, has in no way upgraded its original integration proposal. Furthermore, Family's comparative qualifications, as a limited partner, are no longer relevant to this proceeding. In this light, DBTA now has a slight integration preference over Life Style and DBC.

7. One further matter warrants clarification. In our *Report and Order in Attribution of Ownership Interests*, 97 F.C.C. 2d 1022–23 (1984), we recently determined that limited partnership interests were "non-cognizable" for purposes of our multiple ownership rules, so long as we received assurances that the general partners were properly insulated from any possibility of control or influence by the limited partners. Accordingly, we exempted the mass media interests of limited partners from our multiple ownership rules, after concluding that limited partners are essentially passive investors without any influence or control over the applicant or licensee and that their mass media interests do not inherently affect the distribution or concentration of control within the industry. For similar reasons, we are persuaded that such interests should likewise be accorded non-cognizable status in the comparative hearing process.[5] Consequently, in this case,

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[4] Our discussion of such mergers in general in the June 1985 Order, as well as here, is to provide guidance in this area, which is essentially a matter of first impression. However, as hereinafter discussed, we are not persuaded that the ultimate outcome of this comparative proceeding is affected by the clarification of the Commission's policy in these situations.

[5] To the extent that *Cleveland Television Corp.*, 91 F.C.C. 1129, 1139 (Rev. Bd. 1982) (subsequent history omitted) conflicts with the foregoing reasoning, that case is overruled.

the media interests of DBTA's limited partners have not been factored into the diversification analysis.[6] Notwithstanding this determination, Life Style is still entitled to at least a slight-to-moderate diversification preference over DBTA, in light of the mass media interests attributable to DBTA's general partner. Similarly, DBC still retains a slight diversification preference over DBTA.

8. The foregoing changes in our integration and diversification analyses have no decisional significance because Life Style is still the clear winner. Thus, Life Style has two slight-to-moderate preferences over DBTA and DBC under the diversification and comparative signal coverage criteria, respectively.[7] Although we now award DBTA a slight integration preference over its opponents, this preference does not overcome Life Style's more numerous preferences or otherwise change DBTA's overall position of third in a three-party proceeding.[8]

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed July 22, 1985, by Daytona Beach Television Associates, Ltd. IS GRANTED to the extent that our previous Memorandum Opinion and Order, 101 F.C.C. 2d 1010 (1985), IS MODIFIED as indicated herein, and it IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[6] In the present case, we need not decide whether the appropriate showing of insulation between the general and limited partners has been made, because DBTA places last in this proceeding whether or not the mass media interests of its limited partner are considered. Nevertheless, in future comparative cases, we shall require the same assurances required in the context of our multiple ownership rules from limited partnerships which want to avoid consideration of the mass media interests of their limited partners. *See* 97 F.C.C. 2d at 1023.

[7] In paragraphs 8-10 of *Apogee, Inc.*, FCC 86-3, released January 8, 1986, the Commission gave a further explanation as to why alternative video services are considered in station relocation situations, but are not considered in comparative proceedings for new facilities under the signal coverage criterion. That rationale applies equally to this proceeding.

[8] DBC's slight diversification preference over DBTA outweighs DBTA's slight integration preference over DBC. In addition, DBC is due a very slight coverage preference over DBTA, since DBC will serve about 70,000 more people than DBTA (*See* 97 F.C.C. 2d at 230-32). Thus, DBC also outranks DBTA.

Comparative Coverage Issue
Diversification of Control of Mass Media
Frequency, Equitable Distribution of under 307(b)
Ownership and Management, Integration of

> **Review Board declined to award dispositive Section 307(b) preference in comparative AM broadcast proceeding and awarded grant to applicant having moderate media diversification and ownership integration preferences over runner-up who received only a slight comparative coverage preference.**
> **— *Faye & Richard Tuck, Inc.***
> **MM Docket No. 83-212**

FCC 86R-28

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
FAYE & RICHARD TUCK, INC. KBEC, Waxahachie, Texas	MM DOCKET NO. 83-212 File No. BP-810127AJ
MARCOS A. RODRIGUEZ Carrollton, Texas	MM DOCKET NO. 83-214 File No. BP-810511AJ
BLUEBONNET RADIO BROADCASTERS, INC. Plano, Texas	MM DOCKET NO. 83-215 File No. BP-810511AL
CENTURY BROADCASTING CORPORATION Garland, Texas	MM DOCKET NO. 83-216 File No. BP-810511AM

DONTRON, INC. KPBC, Garland, Texas	MM DOCKET NO. 83-218 File No. BP-810511AP
For Construction Permit for a New AM Station	

Appearances

Kathryn R. Schmeltzer, on behalf of Faye & Richard Tuck, Inc.; *Robert B. Jacobi* and *Mark L. Pelesh*, on behalf of Marcos A. Rodriguez; *Harry C. Martin* and *Cheryl A. Kenny*, on behalf of Bluebonnet Radio Broadcasters, Inc.; *John C. Quale*, *James R. Bayes*, and *Anne D. Neal*, on behalf of Century Broadcasting Corporation; and *Mark E. Fields*, on behalf of Dontron, Inc.

DECISION

Adopted: April 18, 1986; Released: May 9, 1986.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL. BOARD MEMBER BLUMENTAL CONCURRING IN THE RESULT AND ISSUING A SEPARATE STATEMENT.

BOARD MEMBER JACOBS:

1. This proceeding purports to present a novel variation in the cases arising under Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), which examine whether any of a group of competing applicants is entitled to a grant solely because authorization of a broadcast station in their proposed community of license would significantly foster a "fair, efficient, and equitable distribution of radio service" in the area. If no "meaningful" choice of community is possible, *Cosmopolitan Enterprises, Inc.*, 15 FCC 2d 650, 655, 14 RR 2d 1029, 1034 (Rev. Bd. 1968), or if a community choice is made but more than one applicant proposes to serve that community, the ultimate selection of a licensee is based on a comparison of applicant credentials using the media diversification and ownership integration criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965). Here, presiding Administrative

Law Judge (ALJ) Joseph P. Gonzalez held that the proposals for the communities of Carrollton, Plano, and Garland, Texas would offer such similar highpowered, regional AM service in the Dallas-Fort Worth Urbanized Area that no genuine Section 307(b) distinctions could be made, but that the community of Waxahachie, Texas, which is outside the Urbanized Area, involved a "local service" and was otherwise distinguishable so that it deserved a determinative Section 307(b) preference. Initial Decision (I.D.), FCC 85D-63, released October 7, 1985, paras. 27-37. Hence, he granted the application of Faye & Richard Tuck, Inc. (Tuck).[1]

2. The four remaining applicants — Marcos A. Rodriguez (Rodriguez), Bluebonnet Radio Broadcasters, Inc. (Bluebonnet), Century Broadcasting Corporation (Century), and Dontron, Inc. (Dontron) — have filed exceptions and reply briefs, as has Tuck. The Board has reviewed the I.D. in light of these pleadings, the oral argument held February 28, 1986, and our examination of the record.[2] We adopt the findings of fact and conclusions of law in the I.D., except as modified herein. However, contrary to Tuck, Century, Dontron, and the ALJ, we do not believe that a determinative Section 307(b) preference ought to be awarded to any of the applicants and, instead, affirm grant of Tuck's application under the contingent comparative issue. See note 1, *supra.*

3. The impetus for the subject applications was *Clear Channel AM Broadcasting*, 78 FCC 2d 1345, 47 RR 2d 1099, *recon. granted in part*, 83 FCC 2d 216, 48 RR 2d 1077 (1980), *aff'd sub nom. Loyola University FCC*, 670 F.2d 1222 (D.C. Cir. 1982), which made the 770 kHz frequency at issue here available as a Class II-B wide area or localized service. *Id.* at 1351-52, 47 RR 2d at 1103. What created an illusory Section 307(b) dilemma is that Tuck, the first-filed applicant, proffered an avowedly "local" service (Tuck Exhs. 5, p. 1, and 6, pp. 1-3), while the three remaining subsequent applicants outlined wide area, regional proposals. The ALJ examined all of the proposals under a tripartite Section 307(b) mode of analysis — transmission service, reception service, and technological efficiency (service to more people overall) — *see Kaldor Communications, Inc.*, 98 FCC 2d

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[1] Consistent with Voce Intersectario Verdad America, Inc., 100 FCC 2d 1607, 1609 n. 2, 58 RR 2d 445, 447 n. 2 (Rev. Bd. 1985), the ALJ also provided findings and conclusions on the contingent comparative issue, which likewise supported grant of Tuck's application.

[2] On April 14, 1986, Rodriguez requested dismissal of its application. That request will be granted, and its exceptions will not be considered herein.

292, 56 RR 2d 137 (Rev. Bd. 1984), and concluded that while the Tuck proposal was "clearly less efficient" than the others, this inefficiency was outweighed by Tuck's substantial transmission service preference as the first full-time broadcast station in Waxahachie. I.D., para. 37. Although the Carrollton and Garland applicants also proposed first full-time local services, this was disregarded by the ALJ, using the "suburbanite" model of *Debra D. Carrigan*, 100 FCC 2d 721, 58 RR 2d 96 (Rev. Bd.), *recon. denied*, 101 FCC 2d 218, 58 RR 2d 111 (Rev. Bd. 1985), because all four of the other proposals were treated essentially as Dallas-Fort Worth stations. As the ALJ put it, "The Dallas-Ft. Worth areas has a plethora of local broadcast service whereas Waxahachie has a single, daytime only AM station." I.D., para. 33.

4. The exceptions challenge the validity and appropriateness of the *Carrigan* "suburbanite" model, arguing either that such proposed community of license is distinct and that the "traditional" Section 307(b) community-comparison model should be applied, or that the inefficiency of Tuck's proposal destroys any Section 307(b) preference that it might otherwise deserve.[3] Not surprisingly, every applicant except Bluebonnet believes that it deserves a dispositive "traditional" Section 307(b) preference.[4] On the other hand, Bluebonnet is the only applicant who agrees with the ALJ that the non-Waxahachie proposals are all regional and do not allow a meaningful Section 307(b) choice among them; hence, Bluebonnet favors awarding the license under the contingent comparative issue (and believes itself the winner thereunder). We agree with Bluebonnet's Section 307(b) conclusion, except that we hold that *all* of the subject proposals — including Tuck's — are regional in nature and are subsumed within the *Carrigan* "suburbanite" model.

5. The *Carrigan* "suburbanite" model is exemplifed by, and rooted in, *Huntington Broadcasting Co.*, 5 RR 721 (1949), *reh. denied*, 6 RR 569 (1950), *aff'd*, 192 F.2d 33 (D.C. Cir. 1951), and holds that no Section 307(b) preference will be awarded where an applicant (or applicants) has specified a "community" that is determined to be a mere appendage of a much larger urbanized

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[3] Bluebonnet goes so far as to urge that Tuck's application should be denied without comparative consideration because of its alleged inefficiency, but cites no case precedent for such a draconian result in a Section 307(b) multiple application context.

[4] Since there is already a full-time AM station licensed to Plano — KTNS (formerly KXVI) — Bluebonnet realizes that it cannot qualify for a "traditional" first local service Section 307(b) preference.

area, and the frequency sought is a high-power class intended for "regional" rather than local coverge needs. *Carrigan*, *supra*, 100 FCC 2d at 728, 58 RR 2d at 101. Specifically, the model focuses on power and class of station; independence or interdependence of specified community to central city of urbanized area; size and proximity of specified community to central city of urbanized area; and signal population coverage and relevant advertising market. *Id.* at 729, 58 RR 2d at 102. Recently commenting on the continued vitality of the "*Huntington* doctrine," as expounded in *Carrigan*, *supra*, the Court of Appeals in *Beaufort County Broadcasting Co.* v. *FCC*, No. 84-1265, slip op. at 13-21 (D.C. Cir. April 11, 1986), emphasized that the doctrine has a metropolitan area, central city-suburban context, and refused to order the Commission to apply it in a non-metropolitan situation.[5] In so ruling, the Court was mirroring the Board's own view that geographical contiguity between central city and suburb is not a prerequisite, although, as the Court opined in *Miners Broadcasting Service, Inc.* v. *FCC*, 349 F.2d 199, 201 n. 6 (D.C. Cir. 1965), "[t]here is some indication that the distance of the suburb from the central city is significant . . . . " Similarly, while *Carrigan* uses the phrase "urbanized area" several times in its "suburbanite" model, the Board did not intend thereby either to adopt as its Section 307(b) metropolitan area standard the U.S. Census Bureau's "Urbanized Area" definition[6] or to prejudge the Commission's still-pending rulemaking proceeding, *Section 307(b) Preferences within Metropolitan Areas* (MM Dkt. No. 83-403), 48 Fed. Reg. 19428 (1983), which seeks to codify the appropriate geographic area for a metropolitan "community" concept under Section 307(b). Indeed, in both *Carrigan* and *Voce*, the Board utilized the Census Bureau's Las Vegas Standard Metropolitan

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[5] The *Beaufort County* and *Carrigan* cases also note that the *Huntington* doctrine and "suburbanite" model have traditionally been perceived as addressing an "exceptional" Section 307(b) factual situation. However, recent Commission experience indicates a marked increase in central city-suburban proposals, probably signaling that the economic viability of still-unlicensed broadcast frequencies is more dependent on non-local urban centers than previously, *i.e.*, desirable frequencies outside of large central cities are now rare. *See, e.g.*, Hispanic Owners, Inc., 99 FCC 2d 1180, 57 RR 2d 695 (Rev. Bd., 1985); *Carrigan, supra; Voce Intersectario Verdad America, Inc., supra* note 1.

[6] According to the Census Bureau, "An urbanized area consists of a central city or cities, and surrounding closely settled territory ("urban fringe") . . . [It] comprises an incorporated place and adjacent densely settled surrounding area that together have a minimum population of 50,000." 1980 Census of Population, Vol. 1, Chap. A, Part 45 (Texas), Rept. PC 80-1-A45 at A-3.

Statistical Area (SMSA),[7] not "urbanized area" data, to support its application of the "suburbanite" Section 307(b) model to the various communities at issue. Until the Commission establishes a precise metropolitan area standard, the Board will continue to weigh all relevant available data bearing on the social, political, and economic relationships between central cities and their suburbs in making "suburbanite" Section 307(b) determinations.

6. With these precepts in mind, we now return to the exceptions to the ALJ's Section 307(b) analysis, outlined in paragraph 4, *supra*. Using the *Carrigan* criteria, the "suburbanite" Dallas-Fort Worth regional nature of the Carrollton, Plano, and Garland proposals is clearcut. The three communities are all separate and distinct political entities under Section 73.1120(a) of the Commission's Rules, 47 CFR 73.1120(a), and have significant 1980 populations ranging from 40,595 for Carrollton to 138,857 for Garland. I.D., para. 29. However, they are all relatively close to the Dallas-Fort Worth dominant urban area (15-19 miles away), and all lie within the Dallas-Fort Worth Urbanized Area. I.D., paras. 14, 16, 20, 29. In addition, the four applicants for these communities intend to use a Class II-B wide area or local channel (see paragraph 3, *supra*) in a clearly high-power regional manner, proposing 5-10 kilowatt daytime operations with primary service areas of 45,645 — 61,981 square miles and populations of 3,644,543 — 4,165,270 persons.[8] I.D., paras. 8, 25. Finally, we note ample evidence in the record of the interdependence of the three communities with the Dallas and Fort Worth central cities. *E.g.*, Bluebonnet Ex. 7 and attachments thereto.

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[7] As to SMSA's, the Census Bureau says: "The general concept of a metropolitan area is one of a large population nucleus, together with adjacent communities which have a high degree of economic and social integration with that nucleus . . . Each SMSA has one or more central counties containing the area's main population concentration: an urbanized area with at least 50,000 inhabitants. An SMSA may also include outlying counties which have close economic and social relationships with the central counties. The outlying counties must have a specified level of commuting to the central counties and must also meet certain standards regarding metropolitan character, such as population density, urban population, and population growth." 1980 Census of Population, *supra* note 6, at A-4.

[8] Although the stations' proposed nighttime operations are much less significant, we do not share Century's view that our *Hispanic Owners* decision requires maximum regional service at night to qualify under the "suburbanite" model, especially where, as here, AM service is involved and the engineering strictures on nighttime coverage are much more severe than during the day. The breadth of the daytime coverage amply demonstrates the focus of the applicants' intentions and programming efforts. *See Policy Statement on Section 307(b)*, 2 FCC 2d 190, 192-93, 6 RR 2d 1901, 1906 (1965).

7. As to Waxahachie, the regional nature of Tuck's proposal is less obvious but sufficiently proven to warrant treating it in the same manner as the other applications and not awarding a Section 307(b) preference. The record facts belie Tuck's avowedly "local" (see paragraph 3, *supra*) service proposal. First, we note that Waxahachie is the least significant of the communities at issue, having a 1980 population of only 14,624. I.D., para 10. This, plus the fact that it is 30 miles away from Dallas, *id*, essentially explains why Waxahachie is not included in the Dallas-Fort Worth Urbanized Area. See note 6, *supra*. On the other hand, we attach importance to its inclusion in the Dallas-Fort Worth SMSA, along with the other three communities. I.D., para. 27. This helps demonstrate that Waxahachie's somewhat greater distance from the SMSA central cities has not diminished its "close economic and social relationships" therewith. *See* paragraph 5 and note 7, *supra*. This reality is strengthened by examining Tuck's engineering proposal, which, while admittedly much more modest than the others, nevertheless encompasses 27,149 square miles and 1,138,170 persons. I.D., para. 25. We balk at characterizing this *relatively* small coverage as purely "local." Indeed, Joint Exh. 1, Figure 8, shows that Tuck's *present* primary service 0.5 mV/m contour[9] encompasses Dallas, Fort Worth, and most of Dallas and Tarrant Counties (in which the central cities are located) and its *proposed* enlarged 0.5 mV/m contour essentially mirrors the 0.5 mV/m contour of Dontroni's *present* AM facilities, which are licensed to Dallas, rather than Garland. Finally, we note that while Tuck's proposed power of one kilowatt is also considerably lower than the other proposals, it is akin to Dontron's previous power as a Dallas station and is double the existing power of the Tuck station. In light of all of the above factors, we reject Tuck's claim to a Section 307(b) preference for Waxahachie and hold that no meaningful Section 307(b) choice can be made amongst the four "regional" Dallas-Fort Worth proposals presently before us.[10] *Cf. Buena Vista Telecasters of Texas*, 94 FCC 2d 625, 54 RR 2d 562 (Rev. Bd.

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[9] Tuck is the licensee of AM daytime-only Station KBEC, Waxahachie, which has been on the air since 1955. Its subject application proposes to change frequencies from 1390 kHz to 770 kHz and to add nighttime service.

[10] Because we are not according Tuck a Section 307(b) preference, we need not reach the several exceptions which urge that the alleged inefficiency of its engineering proposal constitutes a wasting of the 770 kHz frequency which fatally undermines any preference to which Tuck might otherwise be entitled. The relative efficiencies of the various engineering proposals will be considered, for positive preference purposes only, under the comparative coverage aspect of the contingent comparative issue. See paragraph 10, *infra*.

1983) (no Section 307(b) preference in television case involving Dallas-Fort Worth suburbs of Garland and Richardson). This result is also consistent with *Miners Broadcasting Service, Inc.* v. *FCC, supra,* in which the Commission was criticized for using the *Huntington* doctrine to create Section 307(b) inequalities, rather than to destroy them. Using the *Carrigan* "suburbanite" model to favor Waxahachie over the other Dallas-Fort Worth suburbs would, under the facts of this case, smack of the *Miners* vice. Thus, we now consider the ALJ's treatment of the contingent comparative issue.

8. *Contingent Comparative Issue.* Under this issue, the ALJ assessed media diversification demerits against Century and Dontron, based on a number of attributable broadcast interests that each holds outside Texas, and totally discredited the ownership integration proposals of all of the applicants except Tuck and Bluebonnet. As to them, the ALJ gave Tuck 50% full-time quantitative integration credit and Bluebonnet, 11% part-time credit. He concluded that Tuck deserved a substantial integration preference against all of its competitors and a substantial diversification preference against Century and Dontron. Hence, the ALJ declared Tuck the clear winner on a comparative basis, as well as under Section 307(b). I.D., para. 106. No exceptions have been raised concerning Tuck's diversification preferences over Century and Dontron, and we agree with the ALJ that, under *Vacationland Broadcasting Co., Inc.*, 58 RR 2d 439 (1985), *reaff'd*, FCC 86-200, released April 29, 1986, at paras. 11-14, not even a slight diversification demerit should be assessed against Tuck because of its present ownership of the AM facilities that it is attempting to upgrade in this proceeding (see note 9, *supra*). However, we will reduce the magnitude of its diversification preference over Century and Dontron to moderate. *See Focus Television Co.*, 98 FCC 2d 546, 56 RR 2d 1335 (Rev. Bd. 1984).

9. Little need be said about the ownership integration exceptions submitted by Century and Bluebonnet. Even if Century received the 40% *part-time* integration credit that it seeks and Bluebonnet, the 60% *part-time* credit, neither proposal would surpass the 50%*full-time* credit that the ALJ awarded to Tuck or the 40% full-time credit that Tuck would retain if Century's challenge to 10% out of Tuck's 50% credit (the 10% full-time integration proposal of Tuck's program director, Sandra Howell) were granted. *See Daytona Broadcasting Co., Inc.*, 97 FCC 2d 212, 55 RR 2d 1326 (Rev. Bd. 1984), *rev. denied*, 101 FCC 2d 1010 (1985) (7.2% full-time and 12% part-time integration proposals

exceeds 80% part-time integration credit); *Van Buren Community Service*, 87 FCC 2d 1018, 1022 n. 1, 50 RR 2d 115, 119 n. 1 (Rev. Bd. 1981), *rev. dismissed*, 50 RR 2d 1433 (1982) (quantitative integration credit decreases more sharply than proportionally with a corresponding decrease in the number of hours of participation per week). However, even though Tuck enjoys a "clear quantitative difference" in integration credit vis-a-vis Century and Bluebonnet, *Van Buren Community Service, supra*, we will reduce Tuck's integration preference to a moderate one because integration proposals are not entitled to maximum credit where less than a majority of stock ownership is fully integrated. *See Pittsfield Community TV Ass'n*, 94 FCC 2d 1320, 56 RR 2d 134 (Rev. Bd. 1983), *rev. denied*, FCC 84-459 (Comm'n 1984).

10. As to signal coverage matters, we agree with Bluebonnet that it is entitled to a slight comparative coverage preference over Tuck for providing radio service to three and one-half times as many persons as Tuck, even though five or more aural services are already available throughout the proposed service area. *See Daytona Broadcasting Co., supra*. However, Bluebonnet's coverage advantages over its other competitors are too slight to deserve any preferences against them. *Id.* By the same token, we decline to assess a comparative coverage *demerit* against Tuck for having an allegedly "inefficient" coverage proposal, as requested by Century. The *Policy Statement, supra*, 1 FCC 2d at 398, 5 RR 2d at 1913, makes it clear that the "efficient use of frequency" may result in a comparative *preference* to the most efficient applicant; however, no demerits are assessed for inefficiency. *Cf. New Continental Broadcasting Co.*, 88 FCC 2d 830, 844 n. 15, 50 RR 2d 1117, 1129 n. 15 (Rev. Bd. 1981) (subsequent history omitted) (improper to assess "demerits" for the absence or small quantity of qualitative integration enhancing factors). As to Century's contention that the ALJ erred in refusing to disqualify Tuck and Bluebonnet for failure to provide minimum nighttime interference-free primary service to their entire cities of license, as required by Sections 73.24(j) and 73.188(b) of the Rules, 47 CFR 73.24(j) and 73.188(b), see Memorandum Opinions and Orders, FCC 84M-552, released February 1, 1984, and FCC 84M-588, released February 2, 1984, we hold that the subject rulings properly concluded that the engineering proposals substantially complied with the rules in question and that an evidentiary hearing on Century's allegations was unnecessary. *See Andy Valley Broadcasting System, Inc.*, 12 FCC 2d 3, 4-5, 12 RR 2d 691, 693 (1968).

11. *Final Comparative Evaluation.* All decisionally significant exceptions have been considered by the Board. Under the *Policy Statement, supra*, Tuck's moderate diversification and ownership integration preferences make it the clear winner over Bluebonnet, the runner-up, who has gleaned only the slight comparative coverage preference that it requested. *See Louisiana Super Comm. Ltd. Partnership*, 102 FCC 2d 1293, 59 RR 2d 761 (Rev. Bd. 1985) (substantial integration preference significantly outweighs slight coverage preference). Hence, we affirm the ALJ's ultimate conclusion that grant of Tuck's application will best serve the public interest, convenience, and necessity.[11]

12. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Marcos A. Rodriguez on October 3, 1985; by Century Broadcasting Corporation on December 10, 1985, February 6, 1986, and March 14, 1986; and by Faye & Richard Tuck, Inc. on December 30, 1985 (as supplemented on January 8, 1986) ARE GRANTED, and the amendments ARE ACCEPTED;

13. IT IS FURTHER ORDERED, That the motion to dismiss filed by Marcos A. Rodriguez on April 14, 1986 IS GRANTED, and the application of Marcos A. Rodriguez (File No. BP-810511AJ) IS DISMISSED; and

14. IT IS FURTHER ORDERED, That the application of Faye & Richard Tuck, Inc. (File No. BP-810127AJ) for authority to operate an AM broadcast station on 770 kHz at Waxahachie, Texas IS GRANTED, and the applications of Bluebonnet Radio Broadcasters, Inc. (File No. BP-810511AL), Century Broadcasting Corporation (File No. BP-8105411AM), and Dontron, Inc. (File No. BP-810511AP) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

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[11] Even if we were to grant Dontron's request for a moderate comparative preference based on its existing Dallas station's past broadcast record, an issue which the ALJ refused to add, it could not prevail over Tuck. *Cf. Communications Properties, Inc.*, FCC 83-320, released July 7, 1983, note 1, *aff'g* 92 FCC 2d 45, 52 RR 2d 981 (Rev. Bd. 1982) (even substantial preferences for past broadcast record and ownership integration cannot outweigh a substantial diversification preference). Here, Tuck's diversification and integration preferences clearly exceed Dontron's *arguendo* moderate past broadcast record preference.

Statement of Board Member
Norman B. Blumenthal
Concurring In Result

With sincere respect to my colleagues, I cannot join in their analysis of the Section 307(b)[1] issue of this case; and, but for the fact that the Waxahachie applicant prevails here under the comparative issue in any event, this statement would likely have been in dissent.

While indeed sympathetic to the majority's difficulty in reaching close judgments under Section 307(b) until the Commission concludes its proceeding in *Section 307(b) Preferences Within Metropolitan Areas*, MM Docket No. 83-403, 48 Fed. Reg. 19428 (1983), *see ante*, para 5, and sharply cognizant of the problems that attend a case-by-case analysis when competing applicants seek Section 307(b) preferences under the looming shadow of a nearby metropolitan area,[2] I nonetheless believe that the majority's Section 307(b) result in this case stretches the *Huntington* doctrine[3] (or "suburbanite model"[4] beyond what the law allows.

The majority's review commences accurately by noting that Section 307(b) judgments involve "a tripartite Section 307(b) mode of analysis — transmission service, reception service, and technological efficiency. . . ." *Ante*, at para. 3. It also sets out the *Huntington*-inspired criteria used to determine whether an applicant specifying a nearby suburban community cannot be meaningfully distinguished from its competitors.[5] And, finally, it correctly notes that, whereas *Huntington*-type decisions (*i.e.*, suburban community not entitled to § 307(b) preference) were at one time the "exception", *ante*, n. 5,[6] such cases have recently proliferated. *See id.*

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[1] 47 U.S.C. § 307(b).

[2] *See Debra D. Carrigan*, 100 FCC 2d 721, 725-727 (Rev. Bd. 1985) (applications for Comm'n review pending). There the Board noted that phenomena such as "population growth, population shifts, urban sprawl, megalopolae" have all conspired to make these § 307(b) judgments much more difficult. *Id.*, at 726.

[3] *See Huntington Broadcasting Co.* v. *FCC*, 192 F.2d 33 (D.C. Cir. 1951).

[4] *See Debra D. Carrigan, supra* note 2, 100 FCC 2d at 728-731.

[5] Relying on *Carrigan's* "suburbanite model" discussion, the majority opinion states:

> Specifically, the model focuses on power and class of station; independence or interdependence of specified community to central city of urbanized area; size and proximity of specified community to central city of urbanized area; and signal population coverage and relevant advertising market.

Ante, at para. 5.

However, it is in the application of the Section 307(b) principles that I believe the majority may have strayed too far afield in applying *Huntington*. Nobody disputes that Waxahachie has the indicia of a "separate community" within the Commission's lexicon. It is self-governing; has a population of over 14,000; is over 30 miles away from Dallas-Ft. Worth and not in its "Urbanized Area"[7]; and, the Waxahachie applicant proposes only a 1000 watt AM station, not a 50,000 watt "clear channel" operation. *See ante*, para. 7.[8]

But, relying chiefly (if not entirely) on the "reception" aspects of the Waxahachie proposal, the majority has determined, in effect, that Waxahachie is a suburb of Dallas-Ft. Worth, or at least its functional equivalent. In focusing almost exclusively on the "reception" leg of our usual tripartite mode, I fear that the majority may have slipped into precisely the territory shelled by the courts in *Miners Broadcasting Service, Inc.* v. *FCC*, 349 F.2d 199 (D.C. Cir. 1965) and *Pasadena Broadcasting Co.* v. *FCC*, 555 F.2d 1046 (D.C. Cir. 1977).

Inasmuch as this is merely a concurring statement, no further critique of the instant Section 307(b) portion of the decision is necessary. It is sufficient to note my disagreement in the brief

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[6] *See also WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132, 1135-1137 (D.C. Cir. 1985) (aff'g refusal to apply *Huntington* to Portage or Kalamazoo, Michigan applications). There, the applicant losing a Section 307(b) determination had argued that the two cross-river cities were, in essence, a "single community." Relying on the Commission's determination that Portage and Kalamazoo were "separate communities," with Portage having a greater need for a new *transmission* service, the court affirmed our refusal to invoke *Huntington*.

[7] Compare, e.g., Arizona Number One Radio, Inc., FCC 86R-16, released March 26, 1986 (no § 307(b) preference given where all applicants for "regional" Class C frequency were co-adjacent to Phoenix and within the Phoenix "Urbanized Area"). While Waxahachie is in the Dallas-Ft. Worth "Standard Metropolitan Statistical Area," *ante*, para. 7, the Board has recognized that this classification is not determinative. *See Carrigan, supra*, 100 FCC 2d 736 n. 45 (citing *Suburban Policy Statement*, 93 FCC 2d 436, 457 (1983), *aff'd sub nom. Beaufort County Broadcasting Co.* v. *FCC*, No. 84-1384 (D.C. Cir. decided April 11, 1986).

[8] In fact, it was specifically to provide additional local "transmission" service (and particularly at night) that the Commission further broke down its "clear channel" AM frequencies in *Clear Channel AM Broadcasting*, 78 FCC 2d 1345 (1980), *reconsideration*, 83 FCC 2d 216, *aff'd sub nom. Loyola University* v. *FCC*, 670 F.2d 1222 (D.C. Cir. 1982). It is salient, therefore, that the instant Class II-B AM frequency was created by our 1980 rulemaking; and that the Waxahachie applicant here is now one of those daytime-only AM licensees seeking to take advantage thereof. *See ante*, paras. 3 and 7.

discussion above, and to join in the ultimate award to the Waxahachie applicant.

FCC 85D-63

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

FAYE & RICHARD TUCK, INC. KBEC, Waxahachie, Texas	MM DOCKET NO. 83-212 File No. BP-810127AJ
MARCOS A. RODRIGUEZ Carrollton, Texas	MM DOCKET NO. 83-214 File No. BP-810511AJ
BLUEBONNET RADIO BROADCASTERS, INC. Plano, Texas	MM DOCKET NO. 83-215 File No. BP-810511AL
CENTURY BROADCASTING CORPORATION Garland, Texas	MM DOCKET NO. 83-216 File No. BP-810511AM
DONTRON, INC. KPBC, Garland, Texas	MM DOCKET NO. 83-218 File No. BP-810511AP
For Construction Permit for a New AM Station	

Appearances

Kathryn R. Schmeltzer and *Richard R. Zaragoza* on behalf of Faye & Richard Tuck, Inc.; *Robert B. Jacobi* and *Mark L. Pelesh* on behalf of Marcos A. Rodriguez; *Cheryl A. Kenny* and *Harry C. Martin* on behalf of Bluebonnet Radio Broadcasters, Inc.; *John C.*

Quale, *John S. Logan* and *James R. Bayes* on behalf of Century Broadcasting Corporation; *Mark E. Fields* on behalf of Dontron, Inc.; and *Robert A. Zauner* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: October 1, 1985; Released: October 7, 1985

Preliminary Statement

1. By *Hearing Designation Order* released on March 21, 1983 (Mimeo No. MM 3002), the Commission designated for hearing in a consolidated proceeding the mutually exclusive applications of Faye & Richard Tuck, Inc. (Tuck), Marcos A. Rodriguez (Rodriguez), Bluebonnet Radio Broadcasters, Inc. (Bluebonnet), Century Broadcasting Corporation (Century) and Dontron, Inc. (Dontron) for authority to construct and operate a new AM broadcast station on 770 kHz, together with the applications filed by Athens Broadcasting Company, Inc. (Athens) and Plano Broadcasting Corporation (Plano) which are no longer a part of this proceeding.[1]

2. The Commission in the aforementioned *Hearing Designation Order* specified the following issues which, for purposes of clarity, have been renumbered:

1. To determine whether the antenna systems proposed by Rodriguez, Century and Dontron can be adjusted and maintained within the proposed limits of radiation.
2. To determine, with respect to the Rodriguez proposal, whether circumstances exist which warrant a waiver of Section 73.21(a)(2)(ii)(C) of the Commission's Rules.
3. To determine the areas and populations, which would receive primary service for each proposal, and the availability of other primary aural services to such areas and populations.
4. To determine in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient, and equitable distribution of radio service.
5. To determine, in the event it is concluded that a choice among the

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[1] The Presiding Judge granted Athens' "Motion of Athens Broadcasting Company, Inc. for Severance and Grant" by *Memorandum Opinion and Order*, FCC 83M-2122, released June 28, 1983 and Plano's application was dismissed with prejudice pursuant to its own motion by *Order* of the Presiding Judge, FCC 83M-2936, released August 30, 1983.

applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. By *Memorandum Opinion and Order* released on September 2, 1983 (FCC 83M-3014), the Presiding Judge resolved Issue No. 1 in Century's favor, pursuant to a "Motion for Summary Decision" filed by Century on April 27, 1983, and by *Memorandum Opinion and Order*, FCC 83M-3719, released October 19, 1983, resolved Issue No. 1 in Dontron's favor in response to a "Motion for Summary Decision" filed on September 28, 1983.

4. The Presiding Judge granted Rodriguez' motion for summary decision of the Issues Nos. 1 and 2 by *Memorandum Opinion and Order* released August 25, 1983 (FCC 83M-2875).

5. A prehearing conference was held at the Commission on May 24, 1983, followed by an Admissions Session on October 18, 1983. Hearing sessions were held at the Commission on October 19, 20 and 21, 1983. On November 18, 1983, the parties exchanged proposed rebuttal exhibits, and an Admissions session was held with respect to the rebuttal exhibits on December 16, 1983. Surrebuttal exhibits were exchanged on January 25, 1984, and a further hearing session was held on February 7, 1984. The record was closed at the conclusion of the further hearing session. Proposed findings of fact and conclusions of law and replies thereto have been filed by all applicant parties.

6. On December 5, 1983, an application was filed with this Commission for consent to assign the license of station KXOL, Fort Worth, Texas to Metro Market Broadcasting, Inc., a wholly owned subsidiary of Latin American Broadcasting Company (Latin American). *See, Order* released in this proceeding on January 17, 1984, FCC 84M-262. By letter dated May 3, 1984, the Commission's Mass Media Bureau informed counsel for Mr. Rodriguez who is Latin American's sole owner that his application for the 770 kHz frequency and the assignment application for KXOL, Fort Worth, Texas were inconsistent applications, and it ordered Rodriguez to choose between the two. Rodriguez appealed the Bureau's ruling and resolution of this matter was delayed pending action by the Commission on the Rodriguez appeal.

7. By letter dated August 29, 1985, Tetco, Inc., the licensee and proposed assignor of station KXOL(AM), Fort Worth, Texas unilaterally requested dismissal of the pending application for assignment of the license of station KXOL to Metro Market

Broadcasting, Inc. The Commission by letter dated September 11, 1985, granted the request and dismissed the application. Accordingly, the matter at hand now stands ready for resolution.

Findings of Fact

8. The applicants propose the following facilities:

Applicant	File No.	Docket No.	Facilities
Tuck	BP-810127AJ	83-212	KBEC, Waxahachie, Texas Has: 1390 kHz, 0.5 kW, DA-D Req: 770 kHz, 1 kW, DA-N, U
Rodriguez	BP-810511AJ	83-214	Req: 770 kHz, 2.5 kW, 5 kW-LS, DA-2, U Carrollton, Texas
Bluebonnet	BP-810511AL	83-215	Req: 770 kHz, 1 kW, 10 kW-LS, DA-2, U Plano, Texas
Century	BP-810511AM	83-216	Req: 770 kHz, 1 kW, 10 kW-LS, DA-2, U Garland, Texas
Dontron	BP-810511AP	83-218	KPBC Has: 1040 kHz, 1 kW, D (Dallas, Texas) Req: 770 kHz, 1 kW, 5 kW-LS, DA-2, U (Garland, Texas)

The Communities Proposed to be Served

Waxahachie, Texas

9. Tuck proposes to change its current AM broadcast facility, KBEC, Waxahachie, Texas from a daytime only broadcast service to a fulltime broadcast service to Waxahachie, Texas (Tuck Ex. 1, p. 1; Tuck Ex. 5, p. 1). There are no other broadcast facilities licensed to Waxahachie (Tuck Ex. 5, p. 1).

10. Waxahachie, Texas is located approximately 30 miles south of Dallas, Texas. As of 1980, the population of Waxahachie was 14,624, of whom 2,817 were Blacks and 1,483 were Hispanics (Tuck Ex. 5, p. 1, 11). It is projected that Waxahachie will have a population of between 17,000 and 40,000 by 1990, and between 20,000 and 57,500 by the year 2000. The 1980 United States Census included Ellis County within the Dallas-Ft. Worth Standard Metropolitan Statistical Area (Dontron Rebuttal Ex. 1).

11. Waxahachie is a city incorporated under the laws of the State of Texas, and it is governed by a council-manager form of government under a City Charter and Code of Ordinances (Tuck

Ex. 5, p. 2). City services are provided by a number of departments with funding provided by the Waxahachie city budget (Tuck Ex. 5, pp. 3-5). Waxahachie is also the county seat of Ellis County, and a number of offices of the Ellis County government are located in Waxahachie (Tuck Ex. 5, p. 9). Waxahachie is served by a daily newspaper, the *Waxahachie Daily Light* (Tuck Ex. 5, p. 22).

12. The Waxahachie School District operates one senior high school, one junior high school, one middle school, two elementary schools, and several associated facilities (Tuck Ex. 5, pp. 14-15). The community has a medical center providing family health care, outpatient, and minor surgical services, and a hospital with 72 rooms (Tuck Ex. 5, p. 16). There are 51 churches of a variety of denominations in Waxahachie, as well as a number of cultural and recreational facilities (Tuck Ex. 5, pp. 16-17).

13. Waxahachie is the main shopping area for Ellis County (Tuck Ex. 5, p. 19) which has a total area of 951 square miles and a total population of 59,743 persons (Century Rebuttal Ex. 2, p. 2). Agricultural/residential and commercial/industrial properties within the County have remained in relative parity over the past decade. Ellis County's 1982 farm income exceeded that of all but one of the five counties surrounding Dallas-Ft. Worth in 1982 (Tuck Ex. 5, pp. 21-22).

Carrollton, Texas

14. Mr. Rodriguez proposes Carrollton, Texas as his city of license. Carrollton is located 15 miles from Dallas, Texas. As of the 1980 Census, Carrollton had a population of 40,595, of which 1.83 percent is Black and 6.27 percent is Hispanic (Rodriguez Ex. 2, p. 1 and Ex. A). The North Central Texas Council of Governments predicts that Carrollton's population will be approximately 55,000 in 1990 (Rodriguez Ex. 2 at Ex. B), whereas the Economic Development Division of Texas Power and Light foresees a more rapid growth to approximately 100,000 persons by 1990 (Rodriguez Ex. 3, p. 1).

15. Carrollton's form of government consists of a mayor and a seven-member council (Rodriguez Ex. 3, p. 1). There are a total of 13 elementary schools, 3 junior high schools, 2 high schools and 1 alternative school in Carrollton, as well as 1 municipal library with 50,000 volumes (Rodriguez Ex. 3, p. 2). The Carrollton School District employs 660 teachers with an annual budget for 1982 of $57,099,650. Carrollton offers public recreation facilities, and all religious denominations have established churches in

Carrollton. As of 1982, there were 61 businesses in Carrollton employing 17,346 persons. Utility services to Carrollton are provided by the Lone Star Gas Company, Dallas City Water, General Telephone and Texas Power and Light (Rodriguez Ex. 3, p. 2). Carrollton is served by two local newspapers, *The Carrollton Chronicle* published daily and the *Metro Crest News* published weekly (Rodriguez Ex. 3, p. 1); (Rodriguez Ex. 2, p. 1). There are no broadcast facilities licensed to Carrollton (Rodriguez Ex. 3, p. 1).

Plano, Texas

16. Bluebonnet specifies Plano, Texas as its city of license. The City of Plano is located in Collin County, approximately 19 miles north of Dallas, Texas (Bluebonnet Ex. 7, p. 1). As of 1980, Plano had a population of 72,331, of which 3.29 percent is Black and 3.49 percent Hispanic (Bluebonnet Ex. 7, p. 1). Projections of Plano's 1990 population range from 80,000 to 160,000 (Bluebonnet Ex. 7, Attachment C, p. 4).

17. Plano is an incorporated city, with a home rule charter adopted in 1961 (Bluebonnet Ex. 7, p.1). It operates under a council-manager form of government, with a city council comprised of a mayor and five city council members. The Plano independent school district includes 18 elementary schools, 6 middle schools, 3 high schools and 2 senior high schools with more than 24,000 students (Bluebonnet Ex. 7, p. 2). Plano is also served by a local fire department employing nearly 100 firemen, and a police department employing approximately 114 officers (Bluebonnet Ex. 7, p. 2). Utilities are provided by Lone Star Gas Company, General Telephone, and Texas Power and Light (Bluebonnet Ex. 7, p. 2).

18. Located within Plano are 7 blanks, 11 savings and loan institutions, 52 churches, 2 libraries, 48 shopping centers and 1 hospital (Bluebonnet Ex. 7, pp. 2–3). The City's economic base includes manufacturing, research, agriculture, real esate, banking, retailing, wholesaling and construction operations and facilities (Bluebonnet Ex. 7, p. 4), as well as two large industrial sites (Bluebonnet Ex. 7, p. 4).

19. Plano is served by one daily newspaper and by one AM radio station, KXBI, which is licensed to Plano and maintains an office and studios within that city (Bluebonnet Ex. 7, p. 5; Tr. 358–59).

Garland, Texas

20. Century and Dontron both propose Garland, Texas as their city of license. Garland is located 15 miles from Dallas, Texas. It is a home rule city which also operates under a council-manager form of government (Dontron Ex. 5; Century Ex. 6, p. 2). City services for the residents of Garland are administered through a professional city manager who is aided by 44 derpartment heads and 1,618 employees (Century Ex. 6, p. 2 and Appendix B). Among the major city departments is the Garland Police Department, composed of 155 officers, and a fire department (Century Ex. 6, p. 2). Garland also has its own municipal water department (Century Ex. 6, p. 2), electric power utility, the Garland Power and Light, which is the third largest municipal power utility in the State of Texas (Century Ex. 6, pp. 2–3), and its own public library system (Century Ex. 6, p. 3). The Garland Parks and Recreations Department administers 64 public parks within the City (Century Ex. 6, p. 3).

21. The Garland Independent School District provides education to more than 30,000 students from kindergarten through high school, as well as vocational training for adults in 54 public school facilities (Century Ex. 6, p. 6). Garland is also home to Richland Community College and Eastfield Community College, as well as Amber University and a branch of East Texas State University (Century Ex. 6, p. 6; Dontron Ex. 5, p. 1). Garland has 3 hospitals, more than 85 churches, and in excess of 70 civic and service organizations (Century Ex. 6, p. 7).

22. There are approximately 300 industrial firms located within Garland with approximately 22,000 employees, and a combined annual payroll for 1982 of approximately $401,000,000. In addition, Garland has more than 2,000 retail establishments with sales for 1981 in excess of $562,000,000 (Century Ex. 6, pp. 4–5), 7 local banks, and 7 savings and loan associations (Century Ex. 6, p. 5).

23. At the present time, no local radio or television broadcast facilities are licensed to the City of Garland, Texas, although a construction permit for a new television station at Garland has been granted by the Commission. The City of Garland has its own newspaper, the *Garland Daily News*, and a cable service owned by Storer Cable Television (Century Ex. 6, p. 8).

24. According to the United States Census conducted in 1980, Garland has a population of 138,857 (Dontron Ex. 5, p. 1; Century Ex. 6, p. 4). Blacks and other minorities represent approximately

16 percent of the City's population (Century Ex. 6, p. 4). The Garland Chamber of Commerce projects that the population of Garland will reach 190,000 by 1990.

The Areas and Populations to be Served by Each Applicant

25. The proposed populations and areas to be served by each applicant are as follows:

0.5 mV/m — Day

Applicant	*Population*	*Area (Sq. Miles)*
Tuck	1,138,170	27,149
Rodriguez	3,644,543	45,645
Bluebonnet	4,165,270	61,981
Century	4,023,865	51,227
Dontron	3,944,819	47,463

10 mV/m — Night

Applicant	*Population*	*Area (Sq. Miles)*
Tuck	50,691	673
Rodriguez	1,018,158	707
Bluebonnet	1,417,840	867
Century	1,269,257	735
Dontron	932,483	748

(Joint Ex. 2, Figure 10, pp. 18–20.)

26. At least five aural services, both daytime and nighttime, are available throughout the proposed areas of service of all five applicants (Joint Ex. 1, pp. 2–3).

307(b) Findings

27. A 307(b) issue was designated in this proceeding because the applicants have selected different cities of license. As noted above, Waxahachie is located 30 miles south of Dallas, Texas, Plano 19 miles north, Garland 15 miles northeast and Carrollton 15 miles northwest of Dallas (Joint Ex. 2). All of the cities, with the exception of Waxahachie, are located within the Dallas-Ft. Worth Urbanized Area. Waxahachie, however, along with the other proposed cities of license is located within the Dallas-Ft. Worth SMSA (Dontron Rebuttal Ex. 1).

28. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission "...make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In resolving a Section 307(b) issue, the Commission

considers all relevant factors which bear upon this mandate. Under the fair and equitable factors, the Commission weighs the relative needs of each of the proposed communities for a new transmission service (*i.e.*, outlet for local expression), as well as the needs of the proposed service areas for a new reception service. Under the efficiency factor, the Commission looks to the areas and populations to be served, the type or class of frequency involved, the power and hours of service and the elimination of causation of an interference area. *See*, *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011 (Rev. Bd. 1969); and *Meredith Colon Johnston*, 33 FCC 2d 324 (Rev. Bd. 1972).

29. Plano, Carrollton and Garland are all separate and distinct political entities which provide a wide range of services to their respective citizens. All three communities have significant populations which range from 40,595 for Carrollton to 138,857 for Garland. They are, however, within relatively close proximity to the dominant urban area, Dallas-Ft. Worth and all lie within the Dallas-Ft. Worth Urbanized Area. They are all clearly subordinate to Dallas-Ft. Worth, and all three fall within that category of community referred to by the Review Board as the "suburbanite model." *See*, *Debra D. Carrigan*, FCC 85R-26, released March 20, 1985 (Rev. Bd.). In addition, all four applicants propose a high powered, regional service to a large geographical area which includes the Dallas-Ft. Worth area as well as the entire communities of Plano, Carrollton and Garland.

30. Although these applicants have selected different cities of license, what they propose to provide is a regional broadcast service to the Dallas-Ft. Worth Area. No genuine 307(b) distinctions can, therefore, be drawn between the communities of Plano, Garland and Carrollton, and, as among themselves, the Presiding Judge finds that none of these communities is entitled to a 307(b) preference.

31. Although Waxahachie lies within the Dallas-Ft. Worth SMSA, it is not located within the Dallas-Ft. Worth Urbanized Area. It is a politically distinct community which also serves as the county seat for Ellis County. The Presiding Judge concludes, therefore, that Waxahachie's location beyond the Dallas-Ft. Worth Urbanized Area and its status as the county seat for Ellis County support the finding that Waxahachie constitutes a separate community from the Dallas-Ft. Worth communities for 307(b) purposes, thereby requiring a determination as to which, if any, of the "communities" is entitled to a 307(b) preference.

32. The areas proposed to be served by the applicants are already well served, and there are no white or gray areas which would be eliminated by a grant of any one of the proposals (Joint Exhs. 1 and 2). The fact that applicants will provide a new broadcast service to their proposed service area is therefore of no decisional significance in comparing the proposals, and none of the applicants is entitled to a reception preference under the fair and equitable factor of 307(b).

33. The Dallas-Ft. Worth area has a plethora of local broadcast service whereas Waxahachie has a single, daytime only AM station. Tuck alone proposes a first, full-time local broadcast service to its designated community. The Presiding Judge concludes therefore that Tuck's proposal to provide Waxahachie with its first full-time service entitles it to a transmission preference over the so-called Dallas-Ft. Worth applicants under the fair and equitable factors considered under Section 307(b).

34. The Commission in its so-called "Clear Channel" decision, *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345 (1980), which resulted in the allocation of the Class II clear channel frequency in question, noted several needs which these additional frequencies were designed to meet. They are as follows: more minority-owned stations; first or second local nighttime radio outlets to those communities lacking them; and additional noncommercial stations. Among the five applicants, only Rodriguez is minority controlled. However, Mr. Rodriguez has made a commitment in this proceeding to divest himself of a controlling stock interest in the licensee of an existing radio station in the Dallas-Ft. Worth Area, in the event that he is the successful applicant in this proceeding. A grant of Rodriguez' application would, therefore, not necessarily result in a gain in minority controlled stations in the Dallas-Ft. Worth area. A grant of Tuck's application would, however, meet the second most pressing need recognized by the Commission, that is the need for a first, full-time local broadcast service.

35. The record contains evidence submitted in support of the contention that Tuck could make modifications in its present operations which would enable it to provide a full-time service on its existing frequency, and at the same time eliminate some interference and expand its broadcast service to Ellis County. *See*, Century Rebuttal Exhs. 2 & 3. Even if we assume that the modifications as outlined in the Volken engineering report (Century Rebuttal Exhs. 2 & 3) are feasible and the stated results attainable, substantial changes would have to be made in Tuck's

existing operations; for example, Tuck would be required to modify the station's two tower directional antenna system to a three tower array, and it would be desirable to acquire additional land at the antenna site (Tr. 625–629) factors which belie the proponents claim that Tuck has a readily available alternative to the service proposed by Tuck in this proceeding.[2] Accordingly, the Presiding Judge finds that Tuck does not have a readily available alternative to the service proposed here, and accordingly, Tuck will suffer no comparative handicap because of its existing broadcast facility in Waxahachie.

36. Bluebonnet and Century both propose to use 10 kW of power as compared to Tuck's 1 kW, and Tuck's proposal would serve 2.5 millon fewer people than Rodriguez' proposal, the most modest of the Dallas-Ft. Worth proposals. Tuck's self-described "local service" would be clearly less efficient than those of the so-called Dallas-Ft. Worth applicants. Although Tuck's proposal would eliminate an adjacent channel interference area of 30 square miles with 3,371 persons from station KGVL, Greenville, Texas operating on 1400 KCS (Tuck Ex. 6), a factor to be considered in determining a proposal's overall efficiency, it is of less significance than the substantially greater areas and populations to be served by the Dallas-Ft. Worth applicants. *See*, *Meredith Colon Johnston*, 33 FCC 2d 324 (Rev. Bd. 1972). Accordingly, the Presiding Judge concludes that the Dallas-Ft. Worth applicants are entitled to a preference under the efficiency factor of Section 307(b).

307(b) Conclusions

37. The Presiding Judge concludes, therefore, that Tuck is entitled to a substantial preference under the fair and equitable factors, and the Dallas-Ft. Worth applicants a substantial preference under the efficiency factor, moderated somewhat by the fact that Tuck's proposal would eliminate an interference area. *See*,

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[2] There are serious deficiencies in the Volken engineering report. For example, it is noted that Mr. Volken, the author of the engineering report, never personally visited the KBEC site. In addition, he was unaware of the amount of land owned by Tuck at its present antenna site (Tr. 612–14), or whether there were any easements which applied to the land which would prevent the erection of a third tower (Tr. 617). Furthermore, Volken's report does not include a site plat plotting the location of the three antenna towers that would be necessary to effectuate the proposal (Tr. 618), and the report does not show where the ground system for the third tower would be located (Tr. 630). Mr. Volken agreed, on cross-examination, that if he were to file an application with the FCC for the proposed changes, the application would have to include a plat showing the three towers, as well as the ground system (Tr. 618–630).

Meredith Colon Johnston, 33 FCC 2d 324 (Rev. Bd. 1972). It is established Commission policy that fair and equitable factors outweigh an efficiency factor in an area that is already well served. *See*, *Johnston*, *supra*; *Dennis A. Sleighter* and *Willard D. Sleighter*, 6 FCC 2d 662 (Rev. Bd. 1967). Accordingly, the Presiding Judge concludes that Waxahachie is the favored community under 307(b) and, on that basis alone, finds that Tuck's proposal would best serve the public interest.

38. Since a reviewing body may disagree with the above set forth 307(b) finding, the evidence received under the contingent comparative issue will now be considered.

Contingent Comparative Issue

Tuck

39. Tuck is a Texas corporation with the following officers, directors, and shareholders: William Richard Tuck, President, Director and 40 percent stockholder; Faye Tuck, Secretary, Director, and 40 percent stockholder; Sandra Howell, Vice President, Director and 10 percent stockholder; and Jeanne Moseley, Treasurer, Director and 10 percent stockholder (Tuck Ex. 1, p. 1).

Diversification

40. Neither Tuck, nor any officer, director or stockholder of Tuck, has any ownership interest in, or control of, any media of mass communications other than the broadcast station KBEC in Waxahachie, Texas (Tuck Ex. 1, p. 2).

Integration

41. Tuck claims a 90 percent full-time quantitative integration credit on the basis of its proposal to integrate 90 percent of its ownership, 50 percent of which are women, on a full-time basis in the affairs of the proposed station.

42. William Richard Tuck, President, Director and 40 percent stockholder of Tuck, will serve as general manager of the station on a full-time basis, devoting at least 40 hours a week to his duties at the station.

43. Mr. Tuck has been a resident of Waxahachie, Texas since 1955, and intends to continue to reside in that community. He was an active member of the Optimist Club of Waxahachie and served as its Vice President and Director. He became a member of the Waxahachie Rotary Club in 1970 and is still a member (Tuck Ex. 2, p. 4). In 1955, Mr. Tuck was elected to the Board of

Directors of the Waxahachie Chamber of Commerce and at the time of the hearing had served on the Board for 28 years. During this time, he also served as Vice President and Chairman of numerous activities (Tuck Ex. 2, p. 4; Tr. 135). In 1955, Mr. Tuck joined the Waxahachie Masonic Lodge # 90 of which he is still a member. In 1955, he was elected President of the Waxahachie Marvin Elementary Parent Teachers Association and was a member for three years (Tuck Ex. 2, pp. 4-5). From 1955 to 1970, Mr. Tuck served on the Board of the Ellis County Farm Bureau and he is also an Honorary 4-H Club member and an Honorary Farmers Association member. Mr. Tuck has also received numerous honors and invitations from various clubs and organizations in Waxahachie, Ellis County and the State of Texas. Mr. Tuck is an active member of the Waxahachie United Methodist Church.

44. Mr. Tuck's broadcast experience began in 1942 with radio station KFFA, Helena, Arkansas. He is presently President, Director, General Manager and 40 percent owner of broadcast station KBEC, Waxahachie, Texas.

45. Faye Tuck is Secretary, Director and 40 percent stockholder of Tuck. She proposes to serve as the proposed station's full-time business manager, devoting at least 40 hours a week to the station's operations.

46. Mrs. Tuck has been a resident of Waxahachie since 1955 and intends to continue to reside in that community. She is a former member of the Waxahachie Optimist Club and the Century Club. Mrs. Tuck held offices with both of these organizations. She is also a former member of the Waxahachie Garden Club and held several offices with that club. Although no longer an active member, she still works with the Garden Club on publicity and fundraising projects. Mrs. Tuck also served as a volunteer worker, secretary and member of the Community Hospital for four to five years. In 1982, she served as Chairman of the Residential Fund Drive of the Ellis County Heart Association, and between 1963 and 1964, she was a member of the City Federation of Clubs, an organization consisting of presidents of all the city clubs, and she handled publicity for that organization. For the past two years, she has been a reporter and member of the Waxahachie Symphony League (Tuck Ex. 3; Tr. 179-182).

47. Mrs. Tuck's broadcasting career began in 1953 when she served as Business Manager for station KBBA, Benton, Arkansas. She started working for station KBEC, Waxahachie in 1955, and has worked for that station on a full-time basis continuously since then.

48. Sandra Howell will serve as the proposed station's full-time program director devoting at least 40 hours a week to her duties at the station. Mrs. Howell presently resides in Garland, Texas and has lived there since 1974. She does not propose to move to Waxahachie if Tuck is the successful applicant.

49. Mrs. Howell served an internship at KWTX-TV, Waco, Texas while attending college. In the fall of 1968, she began working on a full-time basis for station KWTX-TV, writing copy and working in the promotion department. Toward the end of the year 1969, Mrs. Howell began working in the promotion department at station KDFW-TV, Dallas, Texas (Tuck Ex. 4, p. 2-3), and in March 1982, she became Program Director at KBEC. She was full-time program director until April 1983, when she reduced her participation to part-time (Tr. 192).

Rodriguez

50. Marcos A. Rodriguez is the sole owner of Marcus A. Rodriguez, an individual applicant for the construction permit for Carrollton, Texas.

Diversification

51. Marcos A. Rodriguez is President, a director and 57.34 percent owner of Spanish Broadcasting Corporation (SBC), the licensee of station KLAT(AM), Houston, Texas (Rodriguez Ex. 1, p. 1).[3] Rodriguez is also President, a director and owner of 100 percent of the voting stock[4] of Latin American Broadcasting Company (Latin American), the licensee of station KESS(FM) in Fort Worth, Texas. Latin American also owns 11.06 percent of the voting stock of SBC (Rodriguez Ex. 1, p. 1; Tr. 200, 225-226), and, pursuant to a settlement agreement approved June 1, 1983, Latin American acquired 42.5 percent of the stock of Focus Broadcasting of Waco, Inc. which is the permittee of a new television station KWKT, Waco, Texas (Rodriguez Ex. 1, p. 1).[5] In addition, Mr. Rodriguez will serve as a consultant to the

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[3] By amendment received by *Order* released in this proceeding on December 7, 1984 (FCC 84M-5109), Rodriguez reported the filing of an application for the assignment of the license of station KLAT, Houston, Texas.

[4] See amendment to the Rodriguez application received by *Order* released in this proceeding on September 19, 1985 (FCC 85M-3681).

[5] As of July 9, 1985, Latin American no longer has any stock ownership interest in Focus Broadcasting of Waco, Inc., the permittee of television station KWKT, Waco, Texas. (*See*, *Order* released in this proceeding on September 13, 1985, FCC 85M-3588).

transferee of station KWKT, Waco, Texas[6] and the transferee of station KLAT(AM), Houston, Texas.

52. By *Order* released on August 6, 1985 (FCC 85R-65), the Review Board approved a settlement agreement which granted the application of Ganadores Corporation for a new broadcast facility at Universal City, Texas. The settlement agreement included an amendment to the application of Ganadores stating the resignation of Marcos Rodriguez as an officer and director and his relinquishment of stock interests in Ganadores Corporation.[7]

53. In a B cutoff date amendment,[8] Rodriguez indicated that he will divest himself of his ownership interest in Latin American and SBC, and that he will resign as an officer and director of those companies (Rodriguez Ex. 1, p. 1; Tr. 279). Mr. Rodriguez' wife was a member of the five-member Board of Directors of Latin American at the time the Carrollton application was filed (Tr. 296). She did not resign her directorship until two years after the B cutoff date in this proceeding (Tr. 318).

54. Pursuant to an order of the Presiding Judge set forth in Order, FCC 84M-5112, released December 7, 1984, additional information by affidavit of Marcos A. Rodriguez dated December 19, 1984[9] was provided with respect to a publication entitled *Impact Hispano*, published jointly by Jara Enterprises and Latin American Broadcasting Company. Mr. Rodriguez served as executive editor of the publication which provided news and cultural information about the Hispanic community in the Dallas-Ft. Worth area. The first issue was released in April 1984 and the last issue in September 1984. A total of four issues was published, and approximately 10,000 copies of each issue were printed. Mr. Rodriguez resigned as executive editor after the first issue was published and neither Latin American Broadcasting Company nor Mr. Rodriguez held any equity in or derived income from *Impact Hispano*.

Integration

55. Mr. Rodriguez is of Cuban descent. He proposes to be the

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[6] The consultancy agreement between Mr. Rodriguez and Focus Broadcasting of Waco, Inc. was terminated on July 9, 1985. (*See, Order* released in this proceeding on September 13, 1985, FCC 85M-3588).

[7] See amendment to Rodriguez' application received by *Order* released in this proceeding on September 13, 1985 (FCC 85M-3588).

[8] The so-called B cutoff date in this proceeding is July 20, 1981.

[9] The record be and it is hereby reopened for the sole purpose of receiving into the record as Rodriguez Ex. 4 the two page affidavit of Marcos A. Rodriguez dated December 19, 1984.

full-time general manager of the station, and has indicated that he intends to move to Carrollton, Texas in the event that he is the successful applicant (Rodriguez Ex. 1, p. 1).

56. Mr. Rodriguez presently resides in Fort Worth, Texas. He is a member of the Dallas Mexican Chamber of Commerce, the Fort Worth Mexican Chamber of Commerce, the Fort Worth Civic Leader Association, the Westcliff Methodist Church and the American G.I. Forum.

Past Broadcast Experience

57. Mr. Rodriguez' broadcast experience began in 1964 as an announcer and salesman for KBUY(FM) in Fort Worth, Texas. He later became General Manager of that station, and held that position until 1976. KBUY(FM) was purchased in 1976 by a corporation in which Mr. Rodriguez is a majority shareholder, President and Director. After the purchase, Mr. Rodriguez continued to function as General Manager. He is also the President, Director and majority shareholder of the licensee of KLAT(AM) in Houston, Texas (Rodriguez Ex. 1, p. 2).

Bluebonnet

58. Bluebonnet is a corporation composed of the following officers, directors and stockholders: Jim Speck, President, Director and 10 percent stockholder; Mick C. Spellman, Vice President, Director and 41 percent stockholder;[10] David B. McCall, III, Vice President, Secretary, Treasurer, Director and 24.5 percent stockholder; and David B. McCall, Jr., Vice President, Director and 24.5 percent stockholder (Bluebonnet Ex. 1, p. 1).

Diversification

59. Neither Bluebonnet nor its principals, officers or directors has any interest in, or connection with, any medium of mass communications (Bluebonnet Ex. 2).

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[10] Although Mick Spellman currently holds 41 percent of Bluebonnet's voting stock, as of the B cutoff date in this proceeding he held only 11 percent of Bluebonnet's stock. Effective September 14, 1982, Mick Spellman acquired the additional 30 percent interest from Thomas Spellman, formerly a principal of Bluebonnet. Thomas Spellman now holds no interest in Bluebonnet (Bluebonnet Ex. 1). Bluebonnet does not seek comparative advantage by virtue of Mick Spellman's acquisition of the additional 30 percent interest in Bluebonnet following the B cutoff date (Bluebonnet Ex. 1).

Integration

60. Mr. Speck, held 10 percent of Bluebonnet's stock, and was proposed as full-time general manager of the station, devoting 40 hours a week to his duties at the station (Bluebonnet Ex. 3, pp. 1–2). He lived in Richardson, Texas, approximately four miles from Plano and within the proposed service area of the Plano station (Joint Ex. 1, p. 5).[11]

61. Mr. Speck was Chief Engineer and Manager of station KGGM, Albuquerque, New Mexico from 1930 to 1935, and from 1935 to 1937 he was Chief Engineer of station KGNC, Amarillo, Texas. For the following ten years, Mr. Speck was employed as an engineer at stations KRLD and WFAA, Dallas, Texas, and from 1947 to 1958 Mr. Speck was President, Manager and part owner of station KJIM in Fort Worth, Texas. He became a minority owner of station KERB, Kermit, Texas in 1960.

62. Mick C. Spellman, owner of 41 percent of Bluebonnet's stock proposes to work at the station a minimum of 20 hours a week as the station's business manager (Bluebonnet Ex. 4). Mr. Spellman is a long term resident of Forney, Texas, which is approximately 20 to 25 miles from Plano (Tr. 448).

63. David B. McCall, Jr., a holder of 24.5 percent of Bluebonnet's stock, will work at the proposed station a minimum of 20 hours a week as Director of Editorial Policy and Assistant News Director (Bluebonnet Ex. 5, p. 2). Mr. McCall, Jr. is a long term resident of Plano. He served two terms as Mayor of Plano, and is a past president of the Chamber of Commerce, Rotary Club, the United Way and the North Texas Municipal Water District. He presently serves on the Board of Directors of the Institute of Development at Baylor University and the Baylor Medical Foundation, and he recently sat on the District I Grievance Committee of the Texas Bar Association.

64. David B. McCall, III, who holds a 24.5 percent of Bluebonnet's stock, plans to devote a minimum of 20 hours a week to the proposed station serving as its Community Affairs Director and General Counsel (Bluebonnet Ex. 6, p. 2).

65. Mr. McCall, III is presently Chairman of the Planning and Zoning Commission of Plano, Texas, and President of the Plano Chamber of Commerce. In addition, he is a member of the District I Grievance Committee for the State Bar of Texas (Bluebonnet

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[11] By amendment filed on March 22, 1985 and received by *Order* released in this proceeding on April 18, 1985 (FCC 85M–1748), Bluebonnet reported that Mr. Speck died on February 20, 1985.

Ex. 6, p. 1). He formerly served as President of the Collin County Bar Association, and as Chairman of Plano's Board of Adjustments. In addition, he is a past president of the Plano Rotary Club and a former director of the YMCA. He also served as Chairman of the Heritage Centennial during the centennial year for the City of Plano (Bluebonnet Ex. 6, p. 1).

Century

66. Century Broadcasting is a corporation with a single class of stock and more than 50 shareholders (Century Ex. 1, p. 1). The officers and directors of Century are as follows:

Name	*Office*
Howard Grafman	President, Director
Anthony C. Karlos	Vice President and Secretary, Director
George A. Collias	Treasurer, Director
Joe M. Baisch	Director
James S. Soter	Director
Sheldon Grafman	Vice President
Harvey Wittenberg	Vice President
Milan Leggett	Vice President
Richard L. Zumsteg	Vice President
Allan Wilson	Vice President
Lynn Christian	Vice President
Nancy Pool	Vice President
Timothy Sullivan	Vice President
Richard J. Bonick, Jr.	Assistant Secretary-Treasurer

The following persons hold one percent (1%) or more of Century's issued and outstanding voting stock:[12]

Herbert S. & Hannah Braun and Gerald Cutler	4,850 shares	1.01%
James & Betty Cardis	4,950 shares	1.03%
Nicholas Collias	5,887 shares	1.23%
Nick Contos	4,950 shares	1.03%
Sam & Stella Geroulis	4,950 shares	1.03%
George & Nelia Papantonatos	4,950 shares	1.03%
Helen Scott	4,999 shares	1.04%
Joe M. Baisch	9,496 shares	1.98%
James M. Carras	6,450 shares	1.35%
George A. Collias	95,278 shares	19.88%
Howard Grafman	95,278 shares	19.88%
Anthony C. Karlos	95,378 shares	19.90%
George D. Mannos	7,012 shares	1.46%
James S. Soter	20,553 shares	4.29%

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[12] Milan Leggett owns .03 percent of Century's outstanding voting stock.

67. Of the 559,670 shares of Century stock issued and outstanding, 114,664 shares are held by stockholders with less than a 1 percent interest in the Corporation. Century holds 80,437 shares as treasury stock.

Diversification

68. Century is a 77 percent general partner in Century Chicago Broadcasting, Ltd., licensee of WLOO(FM) and WAIT(AM), Chicago (Century Ex. 7, p. 1; Tr. 508). Century also owns 100 percent of KWST, Inc., the licensee of KMGG(FM), Los Angeles,[13] and 100 percent of KMGG, Inc. which in turns owns 100 percent of KMEL, Incorporated, licensee of KMEL(FM), San Francisco (Century Ex. 7, p. 1; Tr. 508). In addition, Century's wholly-owned subsidiary, Century St. Petersburg Broadcasting Corporation, recently became the licensee for station WLFW(AM), St. Petersburg, Florida.[14]

69. Century was the licensee of WABX(FM), Detroit, Michigan until January 5, 1983, when the station was sold (Century Ex. 7, p. 1).

70. Century principals Howard Grafman, Anthony C. Karlos and George Collias are also officers, directors and stockholders of KSHE, Inc., licensee of KSHE(FM), Crestwood, Missouri. In the aggregate, they hold 61 percent of the voting stock of KSHE, Inc. Century has a station management contract with KSHE (Century Ex. 7, p. 1; Tr. 508–509).[15]

71. Century also has a programming subsidiary, Century National Productions which creates ideas for television and cable (Tr. 472–473).

72. Century director Joe Baisch holds a 4.04 percent interest in Total TV, Inc. of Janesville, Wisconsin. He is also trustee of a family trust that holds .68 percent of Total TV, Inc. Century director James Soter is a 6 percent shareholder and a director of a suburban weekly newspaper entitled "Good News Weekly" with a circulation of approximately 30,000 in the Chicago area. Mr. Soter

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[13] On March 23, 1984, the license to operate KMGG(FM), Los Angeles, California, was assigned from KWST, Inc., a wholly owned subsidiary of Century Broadcasting Corporation, to Emmis Broadcasting Corporation of Minnesota. *See, Order* released in this proceeding on June 11, 1984 (FCC 84M–2653).

[14] Amendment received by *Order* released in this proceeding on April 18, 1985 (FCC 85M–1746).

[15] On March 23, 1984, the license to operate KSHE(FM), Crestwood, Missouri, was assigned from KSHE, Inc. with which Century is affiliated, to Emmis Broadcasting Corporation of Minnesota. *See, Order* released in this proceeding on June 11, 1984 (FCC 84M–2653).

is also a 6 percent shareholder and director of "Greek Star", a weekly newspaper with a national circulation (Century Ex. 7, p. 2). Mr. Leggett holds a 4 percent interest in KOZT(FM), Fort Bragg, California (Tr. 499).

Integration

73. Howard Grafman, President, a Director and 19.88 percent shareholder of Century is proposed as the station's part-time Sales Service Director.

74. George Collias, a 19.88 percent shareholder, as well as Treasurer, General Counsel and Chairman of the Board of Century, will serve as part-time Business Manager of the proposed station (Century Ex. 3, pp. 1–2).

75. Milan Leggett, Vice President and Director of Engineering for Century and a .03 percent stockholder will serve as Director of Engineering for the station (Century Ex. 5, pp. 1–2).

76. Messrs. Grafman, Collias and Leggett have extensive past broadcast experience.

Dontron

77. Dontron is a Texas corporation owned solely by its President and Director, Donald B. Crawford.

Diversification

78. As noted above, Dontron is 100 percent owned by Donald B. Crawford. Dontron is the licensee of station KPBC, Dallas, Texas, the station which is proposing to change frequency as well as station location in this proceeding, and of FM station WYCA, Hammond, Indiana (Dontron Ex. 1). Mr. Crawford also owns FM stations WDCX, Buffalo, New York, station WDJC, Birmingham, Alabama, and AM station KBRT, Avalon, California. In addition, he is President, Director, 24.1 percent stockholder and General Manager of FM station WMUZ, Detroit, Michigan (Dontron Ex. 1).

Integration

79. Dontron's sole principal does not propose to be integrated into the affairs of the station.

Auxiliary Power

80. Tuck and Dontron will install auxiliary power to insure uninterrupted service in the event of a power failure to their proposed stations (Tuck Ex. 1, p. 2; Dontron Ex. 4).

Conclusions of Law

Tuck

Diversification

81. Tuck has no chargeable media interests.

Integration

82. Tuck claims 90 percent full-time integration of ownership into management. Richard Tuck will serve as the station's general manager working a minimum of 40 hours a week at the station. Tuck is therefore entitled to a 40 percent quantitative integration credit for its proposal to integrate Mr. Tuck into the affairs of the proposed station. Mr. Tuck has been a resident of Waxahachie continuously since 1955, and has been active in the civic affairs of the community. In addition, Mr. Tuck has extensive past broadcast experience. Tuck's 40 percent quantitative integration credit for Mr. Tuck is therefore qualitatively enhanced by his local residence with civic involvement, and by his past broadcast experience.

83. Faye Tuck became involved in broadcasting in 1953 when she worked as Business Manager at a station in Arkansas (Tuck Ex. 3, p. 3). Since then, she has worked at stations either owned or operated by her husband. Her duties at the proposed station are described as follows: complete charge of the Traffic Department, working with the Sales Department and the Program Director; scheduling all of the station's programming, including spot advertisements, producing the daily program logs; participation in the station's financial transactions; bookkeeping; rendering statements, affidavits of performance, and co-op materials; maintaining the public file; maintaining communication between the station and the community; and assisting all community organizations with publicity on their meetings and fundraising drives (Tuck Ex. 3, pp. 1–2). During the course of her testimony, Mrs. Tuck indicated that her duties at the proposed station would be the same as her present duties at KBEC (Tr. 154, 170), which she described as being responsible for traffic, bookkeeping, and billing (Tuck Ex.3, p. 3; Tr. 119, 128, 154, 170).

84. Prior to the filing of the Tuck application for the new AM station, Mrs. Tuck was never identified as KBEC's business manager (Tr. 150, 152).[16] Moreover, Mrs. Tuck has no staff at

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[16] In an amendment to the 1977 KBEC renewal application, signed by Mr. Tuck, dated June 30, 1977, and received by the Commission on July 5, 1977, Faye

station KBEC (Tr. 118–119), and does not supervise or direct employees, although she assumes Mr. Tuck's duties when he is away from the station (Tr. 187). According to her testimony, she works with her husband in preparing the station's budget and salaries (Tr. 179), and discusses FCC filings and the costs of equipment with Mr. Tuck (Tr. 185–186).

85. There is no evidence of record to indicate that Mrs. Tuck has any management responsibilities at station KBEC. She performs non-managment, for the most part simply clerical duties, and assists her husband with his duties as general manager. Although she stands in his place when he is not at the station, there is no indication in the record that she has any authority distinct from that of her husband. As noted above, Mrs. Tuck indicated that her duties at the proposed station will be the same as those at the existing broadcast facility; duties which have not been shown to be of management level responsibility. Although she has been given the title of business manager with duties which appear to involve some managerial authority, according to her testimony she does not envision her role at the proposed station to be any different from that at KBEC's present facility which has been shown not to involve any management level responsibility. Accordingly, Tuck is not entitled to a quantitative integration credit for the proposed integration of Mrs. Tuck.

86. Mrs. Howell will serve as the station's full-time program manager. Her duties will include supervising the programming side of the station's operations; determining and administering the station's programming policies; supervising the announcers and the control room, as well as training the announcers and coordinating their working schedules. The record indicates, therefore, that Mrs. Howell, as program manager, will have management level responsibilities at the station; and that Tuck is entitled to a 10 percent full-time quantitative integration credit for its proposal to integrate Mrs. Howell into the affairs of the station. This credit is qualitatively enhanced by Mrs. Howell's gender as well as her past residence in Waxahachie, and her prior broadcast experience.

Tuck was described as "traffic manager, secretary, gathers and writes news, bookkeeping . . . " (Tr. 122). In an application for transfer of control filed in connection with KBEC in 1980, also signed by Mr. Tuck, Faye Tuck's position was described as "traffic, bookkeeping, 25 years" (Tr. 127–128). The minutes of a special meeting of the directors of Faye & Richard Tuck, Inc. held in connection with a 1980 transfer of the station, signed by Mrs. Tuck, specified that Faye Tuck will continue as traffic manager and bookkeeper (Tr. 175). Mrs. Tuck has never used a business card identifying herself as business manager and has never signed any station correspondence as business manager (Tr. 174).

Rodriguez

Diversification

87. As noted above, Mr. Rodriguez had a brief association with a short-lived publication, *Impacto Hispano*, which provided news and cultural information to the Dallas-Ft. Worth area between January and September 1984; the same area to be served by Rodriguez' proposed Carrollton AM station. His association with a news publication in the proposed community of license is of comparative significance under the diversification criterion. Similarly, Mr. Rodriguez' role as consultant to the licensees of station KWKT, Waco, Texas and KLAT(AM), Houston, Texas, and Mrs. Rodriguez' position as one of five directors of Latin American Broadcasting Company, the licensee of station KESS, Ft. Worth, Texas, as of the so-called B cutoff date in this proceeding, are also of decisional significance. With respect to Mr. Rodriguez' ownership interest in Latin American Broadcasting Company and Spanish Broadcasting Corporation, the licensees of several broadcast facilities, the Presiding Judge finds that Mr. Rodriguez made an unequivocal diversification commitment on or before the so-called B cutoff date in this proceeding, to divest himself of his interests in these corporations, and he therefore has no chargeable interests in these broadcast facilities. *See, Las Misiones De Bejar TV Co.*, 93 FCC 2d 191 (Rev. Bd. 1983).

Integration

88. Rodriguez claims 100 percent quantitative integration credit on the basis of his proposal to serve as the station's full-time general manager. It is noted, however, that his integration commitment was not made until approximately a week before he executed the B cutoff date amendment proposing his integration (Tr. 266); and that Mr. Rodriguez was unable to state whether or not he discussed the commitment with his wife, although he said that he probably did, and he could not recall her reaction (Tr. 267). It is simply not credible that Mr. Rodriguez would be unable to recall his wife's reaction if his commitment to be integrated on a full-time basis had in fact been a firm one. The commitment would require Mr. Rodriguez and his wife to live apart during the work week for the first time in 27 years of marriage (Tr. 316), since Mrs. Rodriguez is herself committed to work full time at a broadcast facility in San Benito, Texas (Tr. 315), and San Benito is approximately 400 miles from Carrollton. Such a significant

change in a couple's lifestyle would, it seems, generate some discussion. Mr. Rodriguez' inability to recall his wife's reaction can only be explained by concluding that the commitment was not a *bona fide* one and, therefore, generated little or no concern. Mr. Rodriquez' full-time integration commitment is further drawn into question by the fact that one month after he made his commitment to the Carrollton station, Mr. Rodriguez committed himself to work full time at another broadcast facility in Lulling, Texas (Tr. 303-304, 310, 313). Although the Lulling, Texas application was subsequently amended to remove the conflict, Mr. Rodriquez did not notice the inconsistent commitments until his attorney called his attention to the problem (Tr. 314). The Presiding Judge concludes therefore that Mr. Rodriguez' commitment to the Carrollton station lacks credibility and it is discounted, and he finds that Rodriguez is not entitled to any integration credit. *See, Berryville Broadcasting Company*, 70 FCC 2d 1 (Rev. Bd. 1978).

Century

Diversification

89. Century has a number of attributable media interests: a 77 percent general partnership interest in the licensee of station WAIT (AM) and station WLOO(FM), Chicago, Illinois; 100 percent ownership of station KMGG(FM), Los Angeles, California; 100 percent ownership of station KMEL(FM), San Francisco, California; and ownership of station WABX(FM), Detroit, Michigan and station WLFW(AM), St. Petersburg, Florida. Century is also charged with the interests of its shareholders Howard Grafman, Anthony C. Karlos and George Collias who together own 61 percent of the voting stock of the licensee of station KSHE, Crestwood, Missouri. Furthermore, Century has a management contract withy station KSHE, Crestwood, Missouri, a management position relevant under the diversification criterion. *See, Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

90. Century also has a programming subsidiary which must also be considered under the diversification criterion.

Integration

91. Century claims a comparative credit for its proposal to integrate its principals, Howard Grafman, George Collias and Milan Leggett into the affairs of the station. Although each one of these individuals testified that he will devote 20 hours a week

to his duties at the station, Messrs. Grafman and Leggett subsequently indicated that the figure was an average figure, and that there would be weeks when they might spend less than 20 hours a week on their duties at the station (Tr. 472, 496). In addition, Messrs. Leggett and Collias limited their commitment to at least a year after the first six months of operation of the station (Century Ex. 3, p. 2, Century Ex. 5, p. 2). Messrs. Grafman and Collias also testified that the time spent on their duties at the station would be in addition to their present activities which would result in a proposed work week of between 70 and 80 hours for Mr. Grafman (Tr. 471), and between 70 and 90 hours a week for Mr. Collias (Tr. 502–503).

92. A 20 hour week commitment to the proposed station is the minimum amount required to entitle a principal to an integration credit. *See, Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979). Mr. Grafman's and Mr. Leggett's commitment to devote an average of 20 hours a week to the station is less than the 20 hours a week commitment required for a part-time integration credit. In addition, Messrs. Collias and Grafman's commitment is only for a year after the first six months of operation. The Presiding Judge concludes therefore that the commitments of Messrs Collias, Grafman and Leggett of less than 20 hours a week and/or for a prescribed period of time are insufficient to qualify Century for any integration credit, and no credit will be awarded Century.

Bluebonnet

Diversification

93. Neither Bluebonnet nor any of its principals has any ownership interest in, or connection with any broadcast station, newspaper, cable television system or other entity engaged in a medium of mass communications (Bluebonnet Ex. 2).

Integration

94. Bluebonnet claims a 10 percent full-time and 60 percent part-time integration credit on the basis of its proposal to integrate Mr. Speck on a full-time basis, and Messrs. McCall, Jr., McCall, III and Mr. Spellman on a part-time basis.

95. As of the date of the hearing, Mr. speck was 76 years old (Tr. 417) and had been, virtually, in total retirement since 1974 (Tr. 399, 400). Bluebonnet's proposal that Mr. Speck would assume the duties of a full-time general manager after the station becomes operational, after almost 11 years of retirement from

active employment, is simply credible. *See, Veterans Broadcasting Co., Inc.*, 38 FCC 25 (1965). Bluebonnet will not receive any credit for Mr. Speck's proposed participation in the management of the station.

96. Mr. McCall, Jr. will serve as Director of Editorial Policy and Assistant News Director at the proposed station. According to his testimony, he will regularly prepare as well as formulate editorial policy and, at least initially, deliver editorials over the air (Bluebonnet Ex. 5, p. 2; Tr. 387). As assistant news director, Mr. McCall, Jr. will cover and direct the coverage of local news (Bluebonnet Ex. 5, p. 2).

97. With the exception of Mr. McCall, Jr.'s brief reference in his direct testimony to his participation in formulating the editorial policy of the station, the evidence of record does not support a finding that Mr. McCall, Jr. will actively participate in the day-to-day management of the station, or that he will play an important role in policy making at the station. The evidence indicates, rather, that his participation will be limited to reporting back to the station on community functions (Tr. 390–392), and that the title of assistant news director more properly describes his anticipated duties. *See* the Review Board's decision in *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423 (Rev. Bd. 1983) in which the Board states that it doubts that part-time assistant positions can be given decisional significance. No integration credit will be given to Bluebonnet for its proposal to integrate Mr. McCall, Jr. into the affairs of the station.

98. Mr. McCall, III will serve as the proposed station's Community Affairs Director and General Counsel (Tr. 428). He will produce and direct a regular public affairs program featuring local leaders and issues, as well as be in charge of other local public affairs presentations (Bluebonnet Ex. 6, p. 2). As general counsel, he will handle all legal affairs of the station (Bluebonnet Ex. 6, p. 2). After the station is in operation, Mr. McCall, III will spend four hours a week on legal matters and 16 hours a week on community affairs (Tr. 433), and he may occasionally spend less than 20 hours a week on his duties for the station (Tr. 433–435).

99. As stated above, a commitment of 20 hours a week on a regular basis is the minimum hourly commitment required for a part-time integration credit. Mr. McCall, III has indicated that there will be occasions when he will spend less than 20 hours a week on his duties at the station. Accordingly, on that basis alone, Bluebonnet is not entitled to a part-time integration credit for Mr. McCall, III. Furthermore, his duties as described in the

record are not managerial in nature and do not include a role in policy making for the station. On this basis as well, Bluebonnet is not entitled to an integration credit for Mr. McCall, III.

100. It is argued that the integration commitments of the Messrs. McCalls' cannot be credited because of the number of other commitments for their time. Although Mr. McCall, III's current work week totals beween 50 and 70 hours and Mr. McCall, Jr.'s between 60 and 80 hours, both individuals have indicated that they propose to meet their respective commitments to the station by eliminating or reducing the number of hours devoted to certain present activities. The Messrs. McCalls' have shown a willingness to work a long work week in the past and there is nothing in the record which draws into question their continued willingness to do so.

101. Mr. Spellman proposes to work 20 hours a week as the station's business manager. In this capacity he will handle billing and collections, bill paying and the payroll, as well as be responsible for balancing the books. In addition, he will keep Bluebonnet's Board of Directors advised of Bluebonnet's financial status and will participate in all other financial decision making (Bluebonnet Ex. 4, p.1). Mr. Spellman described auditor/bookkeeper as essentially the same thing as business manager (Tr. 460).

102. The *Policy Statement, supra,* identifies business manager as a position likely to involve the occupant in an important role in management of the station. Although Mr. Spellman considers the position of business manager to be essentially the same thing as auditor/bookkeeper, a position which would not necessarily involve management or policy making responsibilities, he also testified that he would participate in the station's financial decision making. The latter responsibility clearly would involve Mr. Spellman in an important role in the management of the station, and Bluebonnet is therefore entitled to a part-time integration credit for Mr. Spellman.

Dontron

Diversification

103. Dontron is to be attributed with 100 percent ownership of station WDCX(FM), Buffalo, New York; station WDJC(FM), Birmingham, Alabama; station KBRT, Avalon, California; and station WYCA, Hammond, Indiana. Mr. Crawford's 24.1 percent interest in station WMUZ, Detroit, Michigan, as well as his

position as general manager of station WMUZ, must also be charged to Dontron under the diversification criterion.

Integration

104. Dontron does not propose any integration of ownership into the management of the station.

Ultimate Conclusions

105. The Presiding Judge finds that there is a greater need for a first local full-time aural broadcast service at Waxahachie than there is for an additional regional service to the Dallas-Ft. Worth area, and that Tuck is entitled to a grant of the construction permit for frequency 770 kHz under Section 307(b) of the Communications Act of 1934, as amended, and it will be so ordered.

106. In the event that the above set forth conclusion is set aside on appeal, the Presiding Judge further finds that Tuck is entitled to a grant under the contingent comparative issue. Tuck has no chargeable media interests, the highest possible standing under the diversification criterion, and proposes 50 percent full-time integration of ownership into management, far more than any other applicant, entitling Tuck to a substantial preference under the integration criterion over all the other applicants. In addition, Tuck's integration credit is qualitatively enhanced by Mr. Tuck's residence in Waxahachie and his involvement in the civic affairs of that community, Mrs. Howell's gender and her past residence in Waxahachie, and the past broadcast experience of both Mr. Tuck and Mrs. Howell. Tuck's proposal is further enhanced by its intention to install an auxiliary power source at its antenna site.

Rulings

107. IT IS ORDERED that for failure to show good cause, the Request for Official Notice filed by Century Broadcasting Corporation on April 27, 1984 IS DENIED.

108. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Faye & Richard Tuck, Inc. (MM Docket No. 83-212, File No. BP-810127AJ) for a change in the facilities of AM broadcast station KBEC from 1390 kHz, 0.5 kW,

DA-D to 770 kHz, 1 kW, DA-N, U, full time, Waxahachie, Texas IS GRANTED subject to the conditions as set forth below; and the applications of Marcos A. Rodriguez (MM Docket No. 83-214, File No. BP-810511AJ), Bluebonnet Radio Broadcasters, Inc. (MM Docket No. 83-215, File No. BP-810511AL), Century Broadcasting Corporation (MM Docket No. 83-216, File No. 810511AM), and Dontron, Inc. (MM Docket No. 83-218, File No. BP-810511AP) ARE DENIED[17]

> This grant is subject to and conditioned upon any action the Commission may deem necessary or appropriate in light of the final outcome of the currently pending appeal entitled *Hubbard Broadcasting, Inc.* v. *FCC*, filed November 4, 1982 at the Supreme Court of the United States (Case No. 82-772).
>
> To insure maintenance of the radiated fields within the authorized values of radiation an antenna monitor of sufficient accuracy and repeatability, having a minimum resolution of 0.1 degree phase deviation and 0.1 percent sample-current deviation, shall be installed and continuously available to indicate the relative phase and magnitude of the sample currents of each element in the array.
>
> Upon receipt of operating specifications and before issuance of a license, permittee shall submit the results of observations made daily of the base currents and their ratios, relative phases, sample currents and their ratios, and sample-current deviations for each element of the array, along with the final amplifier plate voltage and current, the common point current, and field strengths of each monitoring point for both nondirectional and directional operations for a period of at least 30 days, to demonstrate that the array will be maintained within the specified tolerances.

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH P. GONZALEZ, *Administrative Law Judge*

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[17] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Ownership and Management, Integration of
Transmitter Site, Coordination With Another Federal Agency

Review Board affirms grant of CP for new TV station to applicant proposing 100% "integration" over competitor credited with 0%. Loser's 75% principal not credited because of failure to provide objective or substantive showing of how he can effectuate, given his deeply embedded interests and executive duties in a multimillion dollar retailing operation. Its 25% principal not credited for want of management and policy functions. Also, Board struck as *ultra vires* the ALJ's specification of transmitter site coordination issues against winner, because *HDO* had fully addressed the factual situation and required a cooperative effort with NOAA and conditioning of the grant on affording adequate interference protection in lieu of specification of issue.

—*Ft. Collins Telecasters*
MM Docket No. 83-777

FCC 86R-26

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
FT. COLLINS TELECASTERS, A PARTNERSHIP Fort Collins, Colorado	MM Docket No. 83-777 File No. BPCT-830218KG
EAGLE 22, LTD. Fort Collins, Colorado	MM Docket No. 83-779 File No. BPCT-830218KL
For a Construction Permit for a New TV Station	

Appearances

Harry G. Sells, on behalf of Ft. Collins Telecasters, A Partnership; and *Matthew H. McCormick*, on behalf of Eagle 22, Ltd.

DECISION

Adopted: April 15, 1986; Released: May 9, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Ft. Collins Telecasters, A Partnership (Telecasters) and Eagle 22, Ltd. (Eagle 22) for authority to construct a new commercial television broadcast station to operate on Channel 22 at Fort Collins, Colorado. By *Hearing Designation Order*, 48 Fed. Reg. 38300, published August 23, 1983 (hereinafter "*HDO*"), these applications (along with three others subsequently dismissed) were designated for hearing on an air hazard issue against each applicant and on the standard comparative issue, including comparative consideration of the applicants' respective coverage of areas and populations. By *Memorandum Opinion and Order*, FCC 84M-3121, released July 13, 1984, presiding Administrative Law Judge (ALJ) Joseph P. Gonzalez added an issue to explore whether Eagle 22's attempts to coordinate its technical proposal with the Table Mountain Radio Receiving Area was unsuccessful and related technical qualifications and reporting issues. The ALJ resolved the air hazard issues favorably to the applicants and the coordination/technical qualifications issues favorably to Eagle 22. *Memorandum Opinions and Orders*, FCC 83M-3128, released September 12, 1983; FCC 83M-3695, released October 18, 1983; FCC 84M-3976, released September 18, 1984. Then, in an *Initial Decision*, FCC 85D-70, released November 18, 1985 (hereinafter "*I.D.*"), the ALJ resolved the reporting issue favorably to Eagle 22, awarded Eagle 22 a substantial "integration" preference, and granted its application. This proceeding is now before the Review Board on exceptions filed by the parties. We have reviewed the *I.D.* in light of the exceptions and reply briefs and the underlying record.[1] We adopt the general findings of fact and conclusions of law, except as significantly modified herein with respect to Eagle 22's transmitter site, and affirm the ALJ's ultimate conclusion that a grant of Eagle 22's application will best serve the public interest.

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[1] No oral argument was requested by the parties, *see* 47 CFR § 1.277(c); and none was held because such argument would not have materially aided in the resolution of the case. *See Van Buren Community Service*, 87 FCC 2d 1018, 1019 (Rev. Bd. 1981).

2. After reviewing the *I.D.*, the record, and the exceptions, we find that Eagle 22 is easily the preferred applicant on a comparative basis. It is evident from the character of Telecasters' pleadings before the Board that it has staked virtually all on an attempt to have us reverse the ALJ's conclusion that Eagle should not have been disqualified by the ALJ on its transmitter site proposal; Telecasters' exceptions relating to the standard comparative aspects of the case are meager and rather half-hearted. Because we find that the ALJ was "right for the wrong reasons" in not disqualifying Eagle 22 on the transmitter site contretemps, *see infra* paras. 3–8, and otherwise affirm the comparative elements of the *I.D.*, we modify the *I.D.* as indicated below, but affirm the award to Eagle 22 as the superior applicant. Our analysis follows.

Transmitter Site Issues

3. The transmitter site questions in this case present us with yet another situation in which final approval of a specified transmitter site rests (or rested) upon successful coordination with a sister federal agency. Thus, we recently decided a case, *Arizona Number One Radio, Inc.*, FCC 86R-16, released March 26, 1986, in which several of the applicants had specified transmitter sites requiring coordination with, and the final approval of, the Bureau of Land Management (BLM) of the Department of Interior, *see id.* at paras. 3–6. In that case, we ultimately decided that, despite "some lingering misgivings" (*id.*, at para. 6), the applicants specifying sites requiring final approval of Interior's BLM had sufficient "reasonable assurance" of their sites so as to be found basically qualified.[2] In the instant case, Telecasters excepts to the ALJ's refusal to disqualify Eagle 22 on a transmitter site issue, an issue again involving the specification of a site requiring the concurrence of another federal agency. As explained below, we affirm that Eagle 22 is qualified with respect to its transmitter site; however, our reasons for so concluding differ entirely from

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[2] Applicants need not, at the time of application, have absolute (or guaranteed) assurance of the ultimate availability of their sites; any number of circumstances affecting the availability of the specified site can change during the years between the filing of an application and the final grant of a construction permit for broadcast station. For a more complete discussion of the "reasonable assurance" standard used with respect to future transmitter site availability, *see South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840 (Rev. Bd. 1984); *see also Dutchess Communications Corp.*, 100 FCC 2d 218, 222–224 (Rev. Bd. 1985) (Board raises "reasonable assurance" questions) and 101 FCC 2d 243, 249–256 (applicant disqualified, *inter alia*, on transmitter site issue).

those of the ALJ, and substantial modification of the *I.D.* is required in that regard.

4. At the time this case was designated for comparative hearing, there were five competing applicants who had timely filed for the television frequency at contest. *See Hearing Designation Order* (*HDO*) in MM Docket No. 83-776 *et al.*, 48 Fed. Reg. 38300, published August 23, 1983. However, as notified by copy of a letter of June 3, 1983 to the consulting engineer for Eagle 22 from the Boulder, Colorado office of the Radio Frequency Management Office, National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, this Commission's Mass Media Bureau was informed that Eagle 22's technical proposal was in need of further coordination with NOAA's frequency management office so as to protect from radio interference the government's Table Mountain Radio Receiving Area. *See* Letter of B. L. Trotter, Radio Frequency Management Officer [NOAA] to Scott Baxter & Associates, June 3, 1983 (copy to FCC Mass Media Bureau, TV Services).[3] The June 3, 1983 Trotter letter was followed-up by a more direct letter regarding Eagle 22's technical proposal in a missive of June 22, 1983 from W. J. Van Winegarden, Director, Radio Frequency Management [NOAA] to Robert L. Cutts, Chief, Spectrum Management Division, FCC.[4]

5. Thus advised by the two NOAA frequency management officials that further engineering coordination was necessary between it and Eagle 22 (as well as several other of the original five applicants), the *HDO*, issued several weeks later and citing 47 CFR § 73.1030(b), specifically noted that "only Fort Collins

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[3] This letter to Eagle 22's consulting engineers, Scott Baxter & Associates, is reproduced as Appendix B of Telecasters' Exceptions. As to Eagle 22's technical proposal, the Trotter letter of June 3, 1983, in pertinent part, stated:

> The technique that you propose is still a hypothesis and has yet to be proven. As such it will be classified as experimental. The soundness of the hypothesis will not be commented on.
>
> The coordination with this office, due to the high power level estimation at the Table Mountain reference point, will be listed as unsuccessful. *After you have demonstrated that your hypothesis for signal cancellation will reduce the received power level to an acceptable value at the reference point, the coordination with this office will be listed as successful.*

Id. (emphasis added).

[4] This letter is reproduced as Appendix C of Telecasters' Exceptions. In pertinent part, the Van Winegarden letter stated:

> The Department will continue to coordinate with Mr. Baxter [Scott Baxter & Associates] and offer to assist him by suggesting possible technical solutions to resolve the [engineering] problem.

Id.

Television, Inc. [a third applicant] has successfully completed coordination" with the relevant NOAA officials. *HDO* at para. 2.[5] Nonetheless, and as is particularly pertinent here, the *HDO* neither rejected the Eagle 22 technical proposal as specified in its application, nor did it add a transmitter site issue against Eagle 22 based on the recognized need for further coordination between that applicant and NOAA.[6] Rather, the *HDO* expressly *declined* to add an issue on this specific engineering matter; instead, it called for continued coordination by the affected applicants during the hearing process, and the *HDO* declared that the Commission would condition any construction permit grant on the successful competing applicant's ultimate conformance with Section 73.1030(b) of the Commission's rules before a final broadcast license would issue. For the full *HDO* discussion of this matter, *see supra* note 5.

6. Notwithstanding the very precise instructions of the *HDO* that, in view of unresolved coordination between Eagle 22's engineers and NOAA frequency officials — coordination that remained active at the time of hearing designation and beyond[7] — no hearing issue was to be tried on this NOAA transmitter site coordination matter, but that this matter be treated as a condition precedent to any eventual FCC license grant, the ALJ added during the course of the hearing the very engineering issue

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[5] The full text of the *HDO* paragraph 2 relating to this engineering matter stated:

> Section 73.1030(b) of the Commission's Rules states that applicants for a broadcast station authorization to operate in the vicinity of Boulder County, Colorado, are advised to give due consideration, prior to filing applications, to the need to protect the Table Mountain Radio Receiving Zone from harmful interference. Each of these applications is between 25 and 29 miles from the Table Mountain Radio Receiving Zone. While all applicants have been in contact with the Radio Frequency Management Office, as recommended in Section 73.1030(b) of the Commission's Rules, only Fort Collins Television, Inc. has successfully completed coordination. However, even successful coordination does not guarantee that an unacceptable signal level will not occur at Table Mountain. No issues will be specified regarding the successful coordination of the other applicants, but, instead, any grant resulting from this proceeding will be conditioned on the station's actual signal level being less than the value specified in Section 73.1030(b) of the Rules.

[6] By clear contrast, the *HDO* did add specific transmitter site issues against both Telecasters and Eagle 22 for lack of an FAA determination that their transmitter towers would not constitute a hazard to air navigation. *See id.*, at para. 4. However, shortly thereafter, both applicants obtained the necessary FAA clearances, thus obviating the designated air hazard issues. *I.D.*, para. 5.

[7] We pause briefly to note that, on February 28, 1985, NOAA issued to Eagle 22 a letter of "successful coordination" on its original technical proposal. Eagle 22 Exceptions at 8; *see also I.D.*, paras. 9-11.

deliberately forborne in the *HDO*. *See I.D.*, para 4.[8] Relying on the *HDO*), Eagle opposed the addition of the NOAA frequency coordination issues. But, expressly stipulating that it was not abandoning its original proposal, and representing that coordination between its engineers and NOAA would continue on that proposal, Eagle 22 reluctantly amended its engineering proposal on August 28, 1984, therein specifying virtually the same engineering plan as its competitor, Telecasters.[9] The ALJ promptly approved Eagle 22's amended engineering proposal, *I.D.*, para 6, thus obviating the engineering issues he had added on July 13, 1984 (*see supra* note 8). However, when Eagle 22 did finally achieve its anticipated coordination with NOAA on its *original* engineering proposal in February 1985, and then sought to re-amend to its *original* engineering proposal, the ALJ rejected that second amendment. *I.D.*, paras. 9–11.[10]

7. Now before the Board are (1) Telecasters' exceptions to the ALJ's acceptance of Eagle 22's reluctant engineering amendment of August 28, 1984, and (2) Eagle 22's exceptions which argue that the NOAA engineering issues added by the ALJ, which action directly provoked its reluctant and qualified 1984 amendment, should not have been added in the first instance. We fully agree with Eagle 22. It is "black-letter law" that "where there ha[s] been a thorough consideration of the particular question in the designation order," subordinate staff officials such as presiding hearing officials, or even the Board, may not reconsider the

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[8] The formal addition of this issue (and related sub-issues) was effected by the ALJ's *Memorandum Opinion and Order*, FCC 84M-3121, released July 13, 1984. Issue 1 read as follows:

> 1. (a) To determine whether Eagle has been unsuccessful in attempting to coordinate its technical proposal with the Table Mountain Radio Receiving Area; and if so,
>
> (b) To determine the effect of the 'unsuccessful' coordination of Eagle's technical proposal with the Table Mountain Radio Receiving Area on Eagle's technical qualifications to be a Commission licensee.
>
> (c) To determine the effect of the 'unsuccessful' coordination of Eagle's technical proposal with the Table Mountain Radio Receiving Area on the 'comparative coverage' issue specified in this proceeding.

[9] Eagle 22 Exceptions at 7–8. Therein Eagle 22 explains that it filed its amendment, under protest and duress, solely to avoid a lengthy, complex, and very costly hearing on its original engineering proposal, a proposal it never truly abandoned (*see supra* note 7).

[10] The ALJ there ruled that Eagle 22's second amendment (*i.e.*, back to the *original* engineering proposal) did not meet the "good cause" test for amending applications, *see* 47 CFR § 73.3522(b), and would amount to a prohibited comparative "upgrading," since the *original* proposal "would serve a far greater area and population" than the Telecasters' proposal. *See I.D.*, paras. 9–10.

matter or take any action inconsistent with the designation order. *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 720-721 (1966). This is so irrespective of whether the designation order is handed down by the full Commission or — as here — pursuant to a delegated staff authority acting in the name of the Commission. *Frank H. Yemm*, 39 RR 2d 1657 (1977).[11]

8. There can be no doubt that the *HDO* in this case thoroughly considered the NOAA frequency coordination matter (*see supra* para. 5 and note 5), and instructed that, under the circumstances there explained, the matter of such coordination was to be handled not at hearing, but through cooperative effort, and that the NOAA frequency coordination would be addressed by conditioning the construction permit of the successful hearing applicant.[12] We therefore find that the ALJ's addition of the NOAA engineering issues against Eagle 22 on this very matter was, in essence, *ultra vires* and plain error. Accordingly, we vacate the *Memorandum Opinion and Order*, FCC 84M-3121, released July 13, 1984, *nunc pro tunc*, and strike from the record all evidence and material arising thereunder, including Eagle 22's "curative" 1984 amendment in response to that order as well as the ALJ's *Memorandum Opinion and Order*, FCC 84M-3976, released September 18, 1984 accepting that "curative" amendment.[13] For purposes of this case, Eagle 22 shall be considered *as if* it has always proceeded on its *original* engineering proposal, and without the supervention of the ALJ hearing rulings in plain conflict with the *HDO*. And, finally, inasmuch as Eagle 22's original engineering proposal has been since "successfully coordinated" with NOAA as it has always planned and asserted, we find it basically qualified on the transmitter site issue (subject to the

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[11] The *HDO* in this case was issued properly by the Chief, Video Services Division, Mass Media Bureau (for the Chief, Mass Media Bureau), and has the same force and effect as if issued by the full Commission.

[12] We recognize the apparent "Catch-22" situation confronting the ALJ as to the "comparative coverage" matter. However, it seems clear from the *HDO* that any comparative coverage advantage held by Eagle 22 based on its *original* engineering proposal was to be made contingent on its successful coordination with NOAA on that proposal. Had the comparative coverage matter been dispositive in this case, and Eagle 22 ultimately *unsuccessful* with NOAA, the case would then require comparative reevaluation as between the applicants because of a change in "core circumstances." *See generally Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 283-284 (D.C. Cir. 1971) (subsequent history omitted); *W. S. Butterfield Theatres, Inc.* v. *FCC*, 237 F.2d 552, 556 (D.C. Cir. 1956).

[13] In view of this action, we will not rule on any of Telecasters' exceptions relating to Eagle 22's 1984 "curative" engineering amendment, as the entire matter is now legally moot. Also moot is the matter of Eagle 22's second (1985) amendment, seeking to reinstate its *original* engineering proposal.

HDO requirement that "the station's actual signal level" subsequently conform to the value specified in Section 73.1030(b)).[14]

Diversification of Control of the Mass Media

9. The ALJ found both applicants equal with respect to the "diversification" comparative criterion, because Telecasters has no attributable media ownership interests. Eagle 22's small interest in two specialized publishers is *de minimis* and its interest in a producer of television commercials is, based on the record evidence, decisionally insignificant. *I.D.*, paras. 14, 21-23, 39-40. No exceptions having been lodged against any of these "diversification" findings, they stand affirmed. 47 CFR § 1.277(a).

Integration of Ownership and Management

10. *Telecasters' Integration.* Although Telecasters sought credit for 100% fulltime integration of ownership and management for its two principals, John D. Manning (75%) and Helen Riddle (25%), *see I.D.*, paras. 15-18, the ALJ ultimately rejected the integration claims of both, and awarded Telecasters no "integration" credit whatever. As to John D. Manning, the ALJ recorded:

> Mr. Manning is 100 percent owner of Unimart (Tr. 88), President and Chief Executive as well as a member of the Board of Directors (Tr. 88-89). Mr. Manning presently works 4 to 5 days a week for Unimart (Tr. 93) which

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[14] We do not here base our conclusions, in any degree, on a *post hoc propter hoc* rationale. *Compare Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1985), *review denied*, FCC 84-119, released April 2, 1984, *aff'd mem. sub nom. Royce International Broadcasting Co.* v. *FCC*, No. 84-1168 (D.C. Cir. April 30, 1985). There we held that merely because an applicant eventually received government authority for a site affirmatively rejected by the government throughout that proceeding, we would not find that applicant qualified or accept an untimely engineering amendment. The applicant disqualified in *Shoblom* never advised the Commission of the official rejection of his site, and — in part — his failure to report that official rejection was fatal. *See id.*, 93 FCC 2d 1027, 1029-1031. *Cf. Valley FM Radio*, 99 FCC 2d 924 (Rev. Bd. 1984).

Here, Eagle 22 lacked no candor, nor diligence, nor equity, since the Commission was fully advised of NOAA's concerns as to Eagle 22 prior even to the designation of this hearing, and accommodations based on that NOAA notice were deliberately and expressly provided in the *HDO*. Insofar as we can see, Eagle proceeded to perfect its assurance to its *original* site in the exact manner prescribed by the *HDO*, with neither deception nor bad faith. Hence, to the extent not mooted by our foregoing vacation of *Memorandum Opinion and Order*, FCC 84M-3121, adding the NOAA coordination issues, we reject Telecasters' exceptions to the ALJ's resolution of the collateral questions raised under Issue 2 of that same order, *see I.D.*, paras. 35-38. Were there a need to have reached the merits of the ALJ's treatment of those Issue 2 questions, we would have found in favor of Eagle 22 for essentially the same reasons articulated by the ALJ in the *I.D.*

> owns or operates several retail furniture outlets (Tr. 93). Each store has an average of 30 employees, and Unimart has gross annual sales in excess of one million dollars (Tr. 94) and profits between $100,000.00 and $1,000,000.00 (Tr. 94). Mr. Manning did not rule out opening additional outlets, and he did not indicate that he will cease or cutback on the amount of time he devotes to the Unimart operation; nor did he explain how he will meet present and future commitments to Unimart and his full-time commitment to the proposed television station. Absent some indication from Mr. Manning of how his other business interests will be eliminated or curtailed to effectuate his full-time integration commitment, no credit can be given to the Manning integration proposal.

Id., at para. 41. As to Helen Riddle:

> Similarily, Telecasters is not entitled to an integration credit for the proposed participation of Ms. Riddle. She described her duties as paying the bills (Tr. 109), seeing that things are carried out, and keeping the books (Tr. 109). There has been no showing on the record that Ms. Riddle will have any significant policy or managerial role at the station. Her testimony indicates rather that she will perform employee-type functions.

Id., at para. 42.

11. Relying entirely on Manning's terse and self-serving written assertion, Telecasters excepts to the rejection of "integration" credit for Manning, and it claims that Manning's "direct commitment in Telecasters' Exh. No. 2" is sufficient to support his 75% fulltime management "integration" accreditation.[15] Inscrutably, it submits[16]:

> The ALJ cited the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (July 1965); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969). These cases are not applicable since the evidence and integration proposal of Mr. Manning has not been controverted and stands as a credible commitment (see Telecasters' Ex. No. 2).

12. We will affirm the ALJ's conclusions. Apart from the fact that we generally defer to an ALJ's well-considered conclusions regarding the integration claims of an applicant's principals, particularly where such judgments partake of what we might call a "credibility" finding, *see, e.g.*, *Knoxville Broadcasting Corp.*, FCC 86R-13, released March 19, 1986, at para. 23 (citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951))[17], the law is clear that "integration" credit will not automatically be awarded on a naked claim where other objective evidence substantially undercuts that anemic claim. *Knoxville, supra*, at para. 22. Moreover, not only is Telecasters' plea that *Blancett Broadcast-*

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[15] Telecasters' Exceptions at 23-24.

[16] *Id.*, at 24.

[17] *See also WEBR, Inc.* v. *FCC*, 420 F.2d 158, 162 (D.C. Cir. 1969).

ing, supra, is inapposite wrong, we find that particular case to be most especially on point. There, the Board rejected the "integration" claims of three applicant principals who proposed to devote "approximately one-quarter of their time to their proposed station," 17 FCC 2d at 229, because of the extent of their other, outside business interests. The Board stated:

> While these principals, as professional or self-employed men, may possibly be able to arrange their schedules to fulfill their stated ["integration"] commitments, the very existence of their other interests renders questionable their commitments *in the absence of an additional showing by the applicant of the reliability of its integration proposal* in order to support the preference sought.

Id., at 230 (emphasis added). *See also Washington's Christian Television Outreach, Inc.*, 99 FCC 2d 395, 416-420 (Rev. Bd. 1984) (applicant principals denied "integration" credit because of presence of significant outside business interests).[18] Based on the record here, the ALJ is correct in finding that Manning has provided no objective or substantial showing of how he can simply blink away his deeply embedded interests and executive duties in Unimart, a multimillion dollar retailing operation. We are fairly certain that Mr. Manning gives away little for free at Unimart; the same is true here with respect to the very valuable credit for ownershp/management "integration." *Blancett, supra.*[19]

13. We likewise agree with the ALJ's rejection of fulltime management "integration" credit for Mrs. Riddle. It is claimed by Telecasters that [s]he is a female and will be in charge of the Accounting Department . . . . "[20] Telecasters here cites Riddle's

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[18] *Modified on other grounds*, FCC 85-501, released September 16, 1985 (Comm'n), *appeal pending*, No. 85-1649 (D.C. Cir. filed October 10, 1985).

[19] Not to the contrary is *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 585-589 (Rev. Bd. 1982) (majority opinion), *recon. denied*, 92 FCC 2d 914, *review denied*, FCC 83-415, released September 21, 1983 (Comm'n), *aff'd mem. sub nom. Blake-Potash Corp.* v. *FCC*, No. 83-2112 (D.C. Cir. filed April 26, 1985). There the Board stated the salient principle:

> It is well settled that for an applicant to receive credit for the station participation of principals with other time consuming interests, the applicant must demonstrate a reasonable likelihood that the proposals will be fully effectuated.

90 FCC 2d at 586 (majority opinion finding that applicant principal *had* demonstrated, by substantial evidence, that various outside interests would not conflict with fulltime "integration" pledge). *Contra*, the ALJ's *I.D.*, 90 FCC 2d 605, 608-612; 634-636; Dissenting Statement of Board Member Blumenthal, 90 FCC 2d at 599.

[20] Telecasters' Exceptions at 24. It is further claimed that she "will assume responsibilities in other departments that our General Manager will direct (see Telecasters' Ex. No. 3)." *Id.*, at 25. These latter "duties" to be assigned in the

testimony[21]:

> She also testified that 'someone has to be responsible for paying bills and seeing that things are carried out when any kind of construction or building of any kind of business is carried on and I'm sure I would be there' (Tr. 108-109).

As we have held many times, management "integration" credit will not be awarded without a showing that a given principal will hold meaningful "management and policy functions." *E.g.*, *Makai Broadcasting, Inc.*, 102 FCC 2d 322, 324 (Rev. Bd. 1985), *proceeding terminated*, FCC 851-154, released October 31, 1985. We there reiterated the long-settled proposition that "employee-type" functions such as "bookkeeper" or "office manager" warrant no management credit. *See* 102 FCC 2d at 324. Nothing on this record or in Telecasters' perfunctory exceptions militates towards a modification of *I.D.*, para 42, and the ALJ will be affirmed on this point.

Conclusions

14. The exceptions having been considered, and the *I.D.* modified as indicated herein above, we find that Eagle 22 is the favored applicant under the standard comparative issue, based upon the credit awarded for integration of ownership with management control. *See generally Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965).

15. ACCORDINGLY, IT IS ORDERED, That the application of Eagle 22, Ltd. (File No. BPCT-830218KL) IS GRANTED subject to the condition set forth in *Hearing Designation Order*, 48 Fed. Reg. 38300, published August 23, 1983, at paragraph 9; and the application of Ft. Collins Telecasters, A Partnership (File No. BPCT-830218KG) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

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future are not only simply too vague to be credited, *see, e.g., High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 428 (Rev. Bd. 1983), *review denied*, FCC 84-434, released September 19, 1984, *aff'd by judgment*, No. 85-1179 (D.C. Cir. filed February 26, 1986), they give not the slightest clue to any potential *management* function; we are left purely with "a Riddle."

[21] Telecasters' Exceptions at 25.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
FT. COLLINS TELECASTERS, A PARTNERSHIP Fort Collins, Colorado	MM DOCKET NO. 83-777 File No. BPCT-830218KG
EAGLE 22, LTD. Fort Collins, Colorado	MM DOCKET NO. 83-779 File No. BPCT-830218KL
For Construction Permit for a New TV Station	

Appearances

John B. Jacob and *Dennis J. Kelly* on behalf of Fort Collins Television, Inc.; *Harry G. Sells* on behalf of Ft. Collins Telecasters, A Partnership; *Matthew H. McCormick* and *Dennis F. Begley* on behalf of Eagle 22, Ltd.; *Harry F. Cole* on behalf of Fort Collins Minority Broadcasting Company; and *Brian Kilbane* and *Stephen Yelverton* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: November 8, 1985; Released: November 18, 1985

Preliminary Statement

1. This is a comparative proceeding involving the mutually exclusive applications of Ft. Collins Telecasters, A Partnership (Telecasters) and Eagle 22, Ltd. (Eagle) for a construction permit for a new television station on Channel 22, Fort Collins, Colorado.[1]

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[1] The application of Women's Broadcasting of Fort Collins for Channel 22, Fort Collins, Colorado, was dismissed for failure to prosecute by *Order* released February 16, 1984 (FCC 84M-841), and the applications of Fort Collins

2. The *Hearing Designation Order* released in this proceeding on August 9, 1983 (Mimeo No. MM 5768) specified the following issues:

> 1. To determine, with respect to Ft. Collins Telecasters and Eagle 22, Ltd., whether there is reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

The *Hearing Designation Order* noted that there was a significant difference in the size of the areas and populations that the respective applicants proposed to serve and accordingly ordered that the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television services of 64 dBu (Grade B) or greater intensity, be considered under the standard comparative issues for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. The *Hearing Designation Order* further noted that the applicants propose a transmitter site between 25 and 29 miles from the Table Mountain Radio Receiving Zone, which requires that each applicant give due consideration to protecting the Table Mountain Radio Receiving Zone from harmful interference pursuant to Section 73.1030(b) of the Commission's Rules. Accordingly, it ordered that a grant of any one of the applications be conditioned on the concurrence of the aforementioned facility as to the adequacy of the protection afforded to the Table Mountain Radio Receiving Zone.

4. By *Memorandum Opinion and Order* released July 13, 1984 (FCC 84M-3121), the issues in this proceeding were enlarged to include the following:

> 1. (a) To determine whether Eagle has been unsuccessful in attempting to coordinate its technical proposal with the Table Mountain Radio Receiving Area; and if so,
>
> (b) To determine the effect of the "unsuccessful" coordination of Eagle's technical proposal with the Table Mountain Radio Receiving Area on Eagle's technical qualifications to be a Commission licensee.

Minority Broadcasting Company and Fort Collins Television, Inc. were dismissed by *Memorandum Opinion and Orders* released on June 29, 1984 (FCC 84M-2934) and September 19, 1984 (FCC 84M-3997), respectively.

(c) To determine the effect of the "unsuccessful" coordination of Eagle's technical proposal with the Table Mountain Radio Receiving Area on the "comparative coverage" issue specified in this proceeding.

2. To determine:

(a) Whether Eagle disclosed the results of its attempted coordination of its technical proposal with the Table Mountain Radio Receiving Area.

(b) If (a) is resolved in the negative, whether Eagle has complied with Sections 1.65 and 73.3514 of the Commission's Rules.

(c) In light of (a) and (b) above, the effects on Eagle's basic and/or comparative qualifications to be a Commission licensee.

5. The air hazard issues specified against Telecasters and Eagle were resolved in the applicants' favor by *Memorandum Opinion and Order*, FCC 83M-3695, released October 18, 1983, and by *Memorandum Opinion and Order*, FCC 83M-3128, released September 12, 1983, respectively.

6. On August 28, 1984, Eagle petitioned for leave to amend its engineering proposal in order to resolve Issue No. 1 designated in *Memorandum Opinion and Order*, FCC 84M-3121, released July 13, 1984, and on September 6, 1984, Eagle moved for summary decision of Issue No. 1. The petition for leave to amend and the motion for partial summary decision were granted by *Memorandum Opinion and Order*, FCC 84M-3976, released September 18, 1984.

7. Accordingly, only the standard comparative issue and Issue No. 2 designated in *Memorandum Opinion and Order*, FCC 84M-3121, released July 13, 1984 remain to be resolved.

8. A prehearing conference was held on October 14, 1983 and an evidentiary Admissions Session was held on April 6, 1984. The hearing commenced on April 10, 1984, and the record was closed at the conclusion of the hearing on April 10, 1984 (Tr. 135). The record was reopened on October 15, 1984 (Tr. 147) and a further hearing session was held on that date with respect to Issue No. 2 designated in *Memorandum Opinion and Order*, FCC 84M-3121, released July 13, 1984. Proposed findings of fact and conclusions of law and replies thereto were filed by Fort Collins Television, Inc., Telecasters and Eagle, and supplemental findings of fact and conclusions of law and replies thereto were filed by Eagle and Telecasters, the then sole remaining applicants.

Petition for Leave to Amend

9. By petition for leave to amend filed on March 6, 1985, Eagle requests leave to amend the engineering portion of its application to reflect its original engineering proposal.

10. Eagle voluntarily chose to amend the engineering portion of its application in order to address an issue designated in *Memorandum Opinion and Order*, FCC 84M-3121, released July 13, 1984. At the same time, it continued to seek coordination with the Table Mountain Radio Receiving Zone facility in the belief that such coordination was possible. Eagle cannot now argue that the need for the proposed amendment was not foreseeable, or that the need for such an amendment was not due to its prior decision to amend the engineering portion of its application. Furthermore, it is clear that Eagle would gain a clear comparative advantage if permitted to amend its application, since its original engineering proposal would serve a far greater area and population than Telecasters' competing proposal. Accordingly, the Presiding Judge finds that Eagle has failed to show good cause for granting its petition for leave to amend and the petition will be denied.

11. Although the petition for leave to amend will be denied, the tendered petition filed on March 6, 1985 and the supplement thereto filed on March 18, 1985 contain material which the Presiding Judge considers relevant to the disclosure and Sections 1.65 and 73.3514 issues pending against Eagle. The documentation consists of two letters from B. L. Trotter, Radio Frequency Management Officer, United States Department of Commerce, to Scott Baxter of Scott Baxter & Associates, dated February 28, 1985 and March 8, 1985. The material identified above is in the nature of a public report issued by an agency of the Federal government, is self authenticating, and it will be received into evidence on the Presiding Judge's own motion.

Ruling

12. Accordingly, IT IS ORDERED that the record in the above-entitled proceeding IS REOPENED for the limited purpose of receiving into evidence the letter dated February 28, 1985 from B. L. Trotter, Radio Frequency Management Officer, United States Department of Commerce, to Scott Baxter of Scott Baxter & Associates as Presiding Judge Exhibit No. 1, and the March 8, 1985 letter of B. L. Trotter to Scott Baxter as Presiding Judge Exhibit No. 2; and that the record IS CLOSED.

Findings of Fact

Ft. Collins Telecasters, A Partnership

13. Telecasters is a general partnership consisting of two general partners: John D. Manning, a 75 percent partner; and Helen Cessna Riddle, a 25 percent partner (Telecasters Exhs. 2 & 3).

Diversification

14. Neither John D. Manning nor Helen Cessna Riddle have any broadcast or other media interests (Telecasters Exhs. 2 & 3).

Integration

15. John D. Manning testified that he will be the full-time managing partner, devoting at least 40 hours a week to his duties at the station (Telecasters Exh. 2). Mr. Manning indicated that he will employ a station manager, consultants and department heads to assist him in the construction and operation of the television station (Telecasters Exh. 2). Mr. Manning does not claim minority status.

16. Mr. Manning is currently a resident of Englewood, Colorado (Tr. 83), which is located beyond the Grade B contour of Telecasters' proposed station (Joint Exh. 1, p. 10). He has never resided in Fort Collins, Colorado (Tr. 100), and there is no evidence of record that Mr. Manning has ever participated in any civic or community affairs within the service area of Telecasters' proposed station. Mr. Manning will, however, move to Fort Collins, Colorado in the event that Telecasters is the successful applicant (Telecasters Exh. 2).

17. Helen Cessna Riddle testified that she will devote 40 hours a week to the construction and day-to-day operation of the proposed station; and that she will be in charge of the Accounting Department and will assume responsibilities in the other departments "that our General Manager will direct" (Telecasters Exh. 3). Ms. Riddle does not claim minority status.

18. As of the so-called "B" cutoff date of April 29, 1983, Ms. Riddle resided in Weslaco, Texas. In March 1984, she moved to Highlands Ranch, Colorado (Telecasters Ex. 3). The record is silent as to whether or not Ms. Riddle's new address is within the Grade B contour of Telecasters' proposed station. She has indicated, however, that she will move to and become a resident of Fort Collins, Colorado in the event that Telecasters is the successful applicant (Telecasters Exh. 3).

Eagle 22, Ltd.

19. Eagle is a limited partnership. The general partners are: John W. Welsh, with a 38 percent interest; Anya Meacham, with a 23 percent interest; Paul Meacham, with a 17 percent interest; and Lydia Gutierrez, with a 10 percent interest. Eagle's limited partners are: N. B. Shuler, with a 5 percent interest; Rilla Shuler, with a 5 percent interest; and Carolyn Banowetz, with a 2 percent interest (Eagle Exh. 1).

20. Pursuant to Article IX of Eagle's Certificate of Limited Partnership, each general partner shall have an equal voice in the management of the partnership (Eagle Exh. 1). The agreement further provides that the limited partners shall not take part in the management of the business or transact any business for the partnership except in certain situations; specifically, limited partners, as well as general partners, shall be permitted to vote on the following matters:

a. Dissolution of the Partnership prior to December 31, 1999 (51% approval required);

b. Assignment of a general partner's interest and the admission of an additional general partner (100% approval required);

c. Dismissal of a general partner for cause (75% approval required);

d. Sale of the Partnership's assets or the Partnership as a going business (51% approval required);

e. Continuation of the Partnership upon the withdrawal of a general partner (100% approval required).

With respect to these matters, each partner shall have one vote for each one percent of ownership (Eagle Exh. 1).

Diversification

21. Eagle has no ownership interest in any broadcast station or other outlet of mass communications. The only Eagle principals with any media are John W. Welsh and Carolyn Banowetz (Eagle Exh. 6; Tr. 132).

22. John W. Welsh's media interests are as follows: less than one percent ownership interest in the outstanding capital stock of Cablewest Corporation (Eagle Exh. 3).[2] By an amendment filed on April 4, 1983 prior to the "B" cutoff date for this proceeding, Mr.

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[2] Mr. Welsh also holds a note receivable from Cablewest Corporation, secured by a second security interest on cable systems in Kemmerer, Wyoming and adjacent communities (Eagle Exh. 3).

Welsh indicated that he will dispose of all of his stock in Cablewest Corporation prior to the initiation of program tests by Eagle's proposed station (Eagle Exh. 3). Mr. Welsh also owns approximately 5 percent of the outstanding stock of Aviation Maintenance Publishers Company, Inc., and Automotive Maintenance Publishers, Inc., acquired on November 30, 1983, and upon completion of anticipated public stock offerings, he will own between one and two percent of the outstanding stock of each corporation (Eagle Exh. 3). Aviation Maintenance Publishers Company, Inc. publishes various books as well as a monthly magazine on the subject of aviation maintenance (Eagle Exh. 3). The publication is intended for aviation mechanics and it has between five and ten subscribers in the Fort Collins area (Tr. 122); it is not sold on magazine racks (Tr. 122). Automotive Maintenance Publishers, Inc. publishes books on the subject of automobile maintenance (Eagle Exh. 3).

23. Ms. Banowetz owns approximately one one-hundredth of one percent of the outstanding stock of Cablewest Corporation (Tr. 132).

Integration

24. Paul Meacham will work a minimum of 40 hours a week at the proposed station in the position of general manager (Eagle Exh. 2). Mr. Meacham does not claim minority status.

25. Mr. Meacham has lived in the Fort Collins area since approximately February 1982, and prior to that time for approximately a nine-month period in 1977–1978 (Eagle Exh. 2). Mr. Meacham intends to continue to reside in the Fort Collins area if Eagle's application is granted (Eagle Exh. 2).

26. From March 1970 to November 1975, Mr. Meacham was employed full time at stations KDMS and KRIL(FM), El Dorado, Arkansas (Eagle Exh. 2). He held various positions with these stations, including salesman, sales manager and general manager. From November 1, 1975 through January 2, 1978, he was a 50 percent partner of the licensee of station WJFL(AM), Vicksburg, Mississippi, and from November 1975 to approximately May 1977, he was full-time manager and/or a supervising partner of station WJFL (Eagle Exh. 2). For a few months during 1977, he oversaw the operations of stations KDMS and KRIL(FM) as well as WJFL, and for about a nine-month period beginning in 1977, Mr. Meacham was a salesman for station KUAD, Windsor, Colorado (Eagle Exh. 2).

27. Mr. Meacham, along with his wife, Anya Meacham, founded in February 1982, Eagle Syndication which is primarily involved in the production of television commercials for viewing throughout the country (Eagle Exh. 2). The business was incorporated in 1982, with Mr. Meacham as president and 46.5 percent stockholder (Eagle Exh. 2). Recently, Eagle Syndication has become involved in the distribution of a 30-minute mini video program, which is marketed to radio stations (Eagle Exh. 2). None of Eagle Syndication's clients are located in Fort Collins, and Eagle Syndication has no future intention to solicit clients from that community (Eagle Exh. 2). Eagle Syndication does not own any production equipment; it relies instead on free-lance producers to actually make the commercials (Tr. 130; Eagle Exh. 5). Eagle Syndication does not make arrangements for the purchase of television advertising time for the airing of its clients' commercials (Tr. 130) and has no contact with the television stations airing its clients' commercials (Tr. 130–131). Its activities are limited to the actual production of the commercials (Tr. 131). Mr. Meacham will not be involved on a day-to-day basis with Eagle Syndication in the event that Eagle's application is granted (Eagle Exh. 2).

28. Anya Meacham will serve as program director at the proposed station working a minimum of 40 hours a week (Eagle Exh. 5). Her duties will involve coordinating the operations of various departments at the station, such as the production, traffic, sales and news departments, as well as selecting programming for the station (Eagle Exh. 5). Mrs. Meacham has been a resident of Fort Collins since approximately February 1982, and was a former resident of Fort Collins for a nine-month period in 1977–78 (Eagle Exh. 5). She will continue to reside in Fort Collins in the event that Eagle is the successful applicant (Eagle Exh. 5). Mrs. Meacham does not claim minority status.

29. Mrs. Meacham was employed with stations KDMS and KRIL(FM), El Dorado, Arkansas from approximately March 1970 to November 1975, working both part-time and full time (Eagle Exh. 5). Her duties included copywriting, traffic, and attending to a number of miscellaneous details (Eagle Ex. 5). From November 1975 to approximately May 1977, she was employed full time at station WJFL(AM), Vicksburg, Mississippi, where her duties were those of an office manager and included copywriting, bookkeeping, and other duties (Eagle Exh. 5).

30. Mrs. Meacham is Vice President and a 46.5 percent stockholder of Eagle Syndication which has been described above (*see*, para. 27; Eagle Exh. 2). She coordinates the production of commercials for Eagle Syndication's clients, and serves as a liaison between the firm and the free-lance producers hired by the company (Eagle Exh. 5). In the event that Eagle's application is granted, Mrs. Meacham will discontinue her involvement in the management of Eagle Syndication (Eagle Exh. 5).

31. John Welsh will work at the station a minimum of 40 hours a week as business manager (Eagle Exh.3). Mr. Welsh will oversee the station's financial affairs, including accounting, budgeting and rate structuring (Eagle Exh. 3).

32. Mr. Welsh has been a resident of the Fort Collins area for approximately 20 years (Eagle Exh. 3). He will continue to reside there if Eagle's application is granted (Eagle Exh. 3). Mr. Welsh has been an active member of the Finance Committee of the First United Methodist Church, Fort Collins, Colorado since December 1983, and from 1970 through 1981, he was a member of the Rotary Club, Loveland, Colorado (Eagle Exh. 3). Loveland is approximately 10 miles south of Fort Collins and is located within the city-grade contour of Eagle's proposed station (Eagle Exh. 3). In the late 1970's, Mr. Welsh served one year as President of the Northern Colorado Estate Planning Council, and was a member of that organization from 1975 through 1981, and in the late 1960's, for a two-year period, Mr. Welsh participated in the Fort Collins United Way Fund Drive, serving as chairman of the group assigned the task of soliciting contributions from accounting firms (Eagle Exh. 3).

33. Lydia Gutierrez, an Hispanic American, will work a minimum of 40 hours a week at the Fort Collins station as its sales manager (Eagle Exh. 4). In that position, she will supervise the sales staff (Eagle Exh. 4).

34. Ms. Gutierrez has been a lifelong resident of the Fort Collins area (Eagle Exh. 4). She will remain a Fort Collins resident in the event that Eagle's application is granted (Eagle Exh. 4). Ms. Gutierrez is a member and sits on the Finance Committee of the Citizens for Fort Collins Steering Committee, which was formed primarily to support annexation of the site of a proposed new brewery (Eagle Exh. 4). She is also a member of Salud, a social organization whose purpose is to provide an opportunity for persons to learn and practice conversational Spanish (Eagle Exh. 4); a member of the Hispanic Community Committee which meets once a month to discuss the issues in local education of particular

importance to the Hispanic community (Eagle Exh. 4); and a member, between 1974 and 1982, of several school related organizations (Eagle Exh. 4). From 1964 through 1970, Ms. Gutierrez was involved with the Bluebirds and the Camp Fire Girls, and during a part of that time she served as a group leader for the Camp Fire Girls (Eagle Exh. 4). From 1965 through 1968, Ms. Gutierrez was a member of LULAC (League of Latin American Citizens) (Eagle Exh. 4). In addition, she was campaign chairperson for an individual seeking election as City Council Member for Fort Collins, and later as a county commissioner (Eagle Exh. 4). Ms. Gutierrez is a parishioner of John XXIII Catholic Church in Fort Collins (Eagle Exh. 4).

Disclosure and Sections 1.65 and 73.3514 Issues

35. Inquiry was conducted into the facts surrounding Eagle's attempt to coordinate its original engineering proposal with the Table Mountain Radio Receiving Area. The inquiry was ordered because of Eagle's claim of a comparative coverage preference for an engineering proposal which appeared to have been already rejected by the governmental body with which Eagle would have to coordinate its technical proposal. The apparent rejection was set forth in a letter dated June 3, 1983 from B. L. Trotter, Radio Frequency Management Officer of the National Oceanic and Atmospheric Administration (NOAA), Environmental Research Laboratories in Boulder, Colorado, to B. Scott Baxter, Eagle's consulting engineer, in which Eagle's attempted coordination was characterized by Mr. Trotter as unsuccessful (Telecasters Exh. 4). A copy of the June 3, 1983 letter was sent by Mr. Trotter to the FCC's Mass Media Bureau, TV Services (Telecasters Exh. 4). The Commission was not separately notifed by Eagle of the June 3 letter from Mr. Trotter.

36. Mr. & Mrs. Meacham and Mr. Welsh each testified that they made no conscious decision to withhold the June 3, 1983 letter from the Commission; that it had never been their intention to deceive the Commission or competing applicants; and that at all times they acted in good faith (Tr. 214-219; Eagle Exhs. 8, 9 & 10).[3] B. Scott Baxter, Eagle's consulting engineer, testified that he did not consider Mr. Trotter's letter of enough significance to

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[3] Ms. Gutierrez, the fourth and final general partner, became a partner in Eagle after its application was filed and was not involved in any discussions regarding the original engineering proposal. Until Fort Collins Television, Inc. filed its Motion to Enlarge Issues on April 16, 1984, she was unaware of the existence of Mr. Trotter's June 3, 1983 letter (Eagle Exh. 11).

send a copy to counsel or to any of the principals (Eagle Exh. 12; Tr. 200). Eagle's principal, Paul Meacham was unaware that Eagle's application proposed greater coverage than all the other applicants until shortly before the first scheduled hearing session in this proceeding (Tr. 166–169). Prior to that time, Mr. Meacham was under the impression that all of the applicants proposing to use five millon watts would have equal coverage (Tr. 166–169). Mr. Baxter was also unaware of Eagle's substantial coverage advantage until after he saw the comparative coverage exhibit (Tr. 199), and he did not know of Eagle's intention to claim a preference for coverage until after he reviewed the joint engineering exhibit (Tr. 201).

37. It is Eagle's contention that it was under no obligation to report the June 3, 1983 letter from Mr. Trotter since the finding contained therein was of a preliminary nature and, therefore, of no decisional significance; and that Eagle's principals at all times acted in good faith and lacked any motive to conceal a preliminary finding which had already been reported to the Commission. At the very most, Eagle submits, it committed a mistake in judgment as to the applicability of Section 1.65. Furthermore, it argues that no showing has been made of a pattern of repeated violations or other circumstances on Eagle's part which reflects significant carelessness or inattentiveness which would require an adverse finding under this issue.

38. Eagle has succeeded in achieving coordination with the Table Mountain Radio Receiving Area with respect to its initial engineering proposal (Presiding Judge Exhs. 1 & 2). Eagle, therefore, clearly had good reason for believing that such coordination could be achieved, and this recent development gives credence to Mr. Baxter's testimony and that of Eagle's principals that the June 3, 1983 letter from the receiving station was felt by all to be of no decisional significance since it was merely a preliminary finding, and that they were confident that coordination would ultimately be achieved; a confidence which time has shown was merited. The evidence of record supports a finding that Eagle acted in good faith, and that Eagle had good reason for believing that the matter was of no decisional significance. The Presiding Judge further finds that it has not been shown that Eagle's principals at any time failed to report matters of decisional significance, or made any misrepresentations to the Commission with respect to any matter of decisional significance. Accordingly, the disclosure and Sections 1.65 and 73.3514 issues are resolved in Eagle's favor.

Standard Comparative Issue

Diversification

39. Neither Telecasters nor its principals John D. Manning and Helen Cessna Riddle have any broadcast or other media interests. Two of Eagle's principals, John W. Welsh and Carolyn Banowetz, hold media interests. However, prior to the "B" cutoff date, Mr. Welsh made a commitment to divest himself of his less than one percent stock interest in Cablewest Corporation, a cable system operator. This interest is, therefore, of no decisional significance. *See*, *WHW Enterprises, Inc.*, 89 FCC 2d 799 (Rev. Bd. 1982). Similarly, Mr. Welsh's interests in Aviation Maintenance Publishers Company, Inc. and Automotive Maintenance Publishers, Inc. are found to be of no decisional significance since Mr. Welsh's interests in both companies are very small; the materials published by both corporations are of a specialized nature and not intended for the general public; and the only periodical published by either corporation, an aviation maintenance magazine, has an insignificant number of subscribers estimated to be between 5 and 10 in the Fort Collins area. Ms. Banowetz' one one-hundredth of one percent of Cablewest Corporation is *de mimimis* and is also of no decisional significance.

40. Eagle principals Paul and Anya Meacham each own 46.5 percent of Eagle Syndication, and Eagle's limited partners, N. B. Shuler and Rilla Shuler, each own 3.5 percent of Eagle Syndication (Eagle Exh. 2). As noted above, Eagle Syndication is primarily involved in the production of television commercials promoting radio stations throughout the United States. It does not appear from the evidence of record that such an interest would undermine the objectives of diversification, namely maximizing program services and viewpoints and preventing the undue concentration of economic power. The Presiding Judge concludes, therefore, that the ownership interests of Eagle's principals in Eagle Syndication is of no decisional significance under the diversification criterion of the standard comparative issue. *See*, *Golden State Broadcasting Corp.*, 94 FCC 2d 212 (Rev. Bd. 1983).

Integration

Telecasters

41. Telecasters claims a 100 percent quantitative integration credit on the basis of its proposal to integrate Mr. Manning and Ms. Riddle into the affairs of the station on a full-time basis. Mr.

Manning is 100 percent owner of Unimart (Tr. 88), President and Chief Executive as well as a member of the Board of Directors (Tr. 88–89). Mr. Manning presently works 4 to 5 days a week for Unimart (Tr. 93) which owns or operates several retail furniture outlets (Tr. 93). Each store has an average of 30 employees, and Unimart has gross annual sales in excess of one million dollars (Tr. 94) and profits between $100,000.00 and $1,000,000.00 (Tr. 94). Mr. Manning did not rule out opening additional outlets, and he did not indicate that he will cease or cutback on the amount of time he devotes to the Unimart operation; nor did he explain how he will meet present and future commitments to Unimart and his full-time commitment to the proposed television station. Absent some indication from Mr. Manning of how his other business interests will be eliminated or curtailed to effectuate his full-time integration commitment, no credit can be given to the Manning integration proposal. *See, Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982). Furthermore, there is no record evidence indicating what duties Mr. Manning will perform at the station (*see*, Telecasters Ex. 3) or whether Mr. Manning will be involved in an active managerial role at the station. Even if we assume that Mr. Manning as a principal and styled managing partner will have a general supervisory or consultative role, such roles are not considered to be meaningful ownership participation. *See, Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (July 1965); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969). For these reasons as well, Mr. Manning's nonspecific proposed integration cannot be given credit. *See, Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090 (Rev. Bd. 1982).

42. Similarily, Telecasters is not entitled to an integration credit for the proposed participation of Ms. Riddle. She described her duties as paying the bills (Tr. 109), seeing that things are carried out, and keeping the books (Tr. 109). There has been no showing on the record that Ms. Riddle will have any significant policy or managerial role at the station. Her testimony indicates rather that she will perform employee-type functions.

Eagle

43. Eagle intends to integrate all of its general partners into the affairs of the proposed station. Mr. Meacham will serve as the station's general manager, Mrs. Meacham, the station's station manager, Mr. Welsh the business manager, and finally, Ms. Gutierrez as the station's sales manager, all of which are recognized by the *Policy Statement*, *supra*, as staff positions to be

accorded particular weight. In addition, all four individuals will comprise a management committee which will meet once a week to discuss all important management decisions. The Presiding Judge finds, therefore, that Eagle is entitled to a 100 percent quantitative integration credit for its proposal to integrate all of its general partners on a full-time basis.

44. Eagle is entitled to a 100 percent quantitative integration credit as opposed to Telecasters' zero percent quantitative integration credit. Accordingly, Eagle is entitled to a substantial preference under the integration criterion.

45. Although of no decisional significance in view of the substantial integration preference awarded Eagle, it is noted that Eagle's integration proposal is qualitatively enhanced by the fact that all of its general partners reside in the Fort Collins area, and is further enhanced by Ms. Gutierrez' minority status, the local residence with civic participation of both Ms. Gutierrez and Mr. Welsh, and the past broadcast experience of Mr. & Mrs. Meacham.

Ultimate Conclusions

46. Both applicants stand on an equal footing with respect to the diversification criterion, but Eagle is entitled to a clear preference under the integration criterion. Eagle is found, therefore, to be the comparative winner, and its application will be granted and the application of Telecasters denied.

Rulings

47. IT IS ORDERED that the Petition for Leave to Amend filed by Eagle 22, Ltd. on March 6, 1985, as supplemented on March 18, 1985, and the Motion for Leave to File Reply and Reply to Opposition to Petition for Leave to Amend filed by Eagle 22, Ltd. on March 18, 1985 ARE DENIED.

48. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Eagle 22, Ltd. (MM Docket No. 83-779, File No. BPCT-830218KL) for a construction permit for a new television station on Channel 22, Fort Collins, Colorado IS GRANTED, subject to the condition set forth below; and that the

application of Ft. Collins Telecasters, A Partnership (MM Docket No. 83-777, File No. BPCT-830218KG) IS DENIED.[4]

> At the time of equipment tests, permittee will contact the Radio Frequency Management Office of the National Oceanographic and Atmospheric Administration's Environmental Research Laboratories in Boulder, Colorado, at the address specified in Section 73.1030(b) of the Commission's Rules. Permittee will cooperate with the Radio Frequency Management Office authorities in a measurement program to establish that the field strength of the signal at coordinates 40° 07′ 50″ N. Latitude, 105° 14′ 40″ W. Longitude, radiated by the permittee's authorized facilities, does not exceed 30 mV/m. In the event the measured value exceeds 30 mV/m, operation of the station (program tests) shall not be commenced. Instead, the permittee will submit an application for modification of its construction permit to reduce the field strength in the direction of the Table Mountain Radio Receiving Zone below the specified level. A license application will be granted only with the concurrence of the Radio Frequency Management Office as to the adequacy of the protection afforded to the Table Mountain Radio Receiving Zone.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH P. GONZALEZ, *Administrative Law Judge*

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[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Diversification, of Control of Mass Media

In a comparative FM proceeding, a narrow but decisive preference was awarded to the licensee of a daytime only AM station in the designated community, when the AM station was the only station in the community, and the mutually exclusive applicant owned a UHF ABC affiliate which provided the community and 87.5% of the area and 95.3% of the population within the 1.0 mV/m contour of the proposed FM station with a Grade B signal.

— *J. B. B/cing of Texas, Inc.*
MM Docket No. 83-1273

FCC 86-131

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
J. B. BROADCASTING OF TEXAS, INC. **Cuero, Texas**	**MM DOCKET NO. 83-1273** **File No. BPH-821026AQ**
GOBBLER COMMUNICATIONS COMPANY **Cuero, Texas**	**MM DOCKET NO. 83-1274** **File No. BPH-830214AA**
For Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 1986; Released: March 31, 1986

BY THE COMMISSION:

1. This proceeding involves mutually exclusive applications for a new FM station at Cuero, Texas, filed by J. B. Broadcasting of Texas, Inc. (J. B.) and by Gobbler Communications Company (Gobbler). J. B. is the licensee of a 500 watt, daytime only AM

station, KEWS. KEWS is the only broadcast facility licensed to Cuero. Gobbler's 98% owner is Victoria Communications Corporation, licensee of a 155 kilowatt UHF station, KVCT (Channel 19), Victoria, Texas. KVCT is an ABC affiliate. It is located 26 miles from Cuero, which is within its Grade B contour. In a Decision, 100 FCC 2d 822, released April 29, 1985 (Member Blumenthal dissenting), the Review Board granted Gobbler's application. The Board said that a grant of J. B.'s application would give it a monopoly over the broadcast outlets licensed to Cuero, and it gave Gobbler a decisionally significant, slight to moderate diversification preference.[1] Now before the Commission are an Application for Review filed May 21, 1985, by J. B.; and an Opposition, filed June 4, 1985, by Gobbler.

2. A grant to J. B. would give it control over the only two broadcast authorizations assigned to Cuero. On the other hand, the Grade B contour of Gobbler's television station would overlap 87.5% of the area and 95.3% of the population that is within the 1.0 mV/m contour of its proposed FM station. Gobbler, citing *CJL Broadcasting, Inc.*, 95 FCC 2d 544 (1983) and *Radio Greenbrier, Inc.*, 80 FCC 2d 107 (Rev. Bd. 1980), argues that the Commission has consistently awarded diversification preferences to applicants with existing stations outside the community of license, in comparative proceedings also involving applicants who have stations in the designated community of license. Although Gobbler is correct that applicants with existing stations outside the community of license were favored in those two cases, the diversification analysis was not limited to that factor alone. Thus, in *CJL*, the Commission in awarding a preference to the licensee of a daytime AM station in an adjacent community, also noted that it would "provide a new voice during nighttime operating hours," to the radio market in question, while the competing applicant, with an existing full-time AM station, would provide no new media voice. 95 FCC 2d, *supra* at 548. Similarly, in *Radio Greenbrier*, the Board awarded a preference to a daytime AM licensee, in part because its interest was "in a station not operating at night," whereas the competing applicant was already

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[1] J. B. was credited with 3.48% integration and Gobbler with 2% integration. J. B.'s integration was enhanced by local residence, civic participation, and past broadcast experience. The Board found J. B.'s preference was reduced "almost to the point of gossamer" because of Gobbler's auxiliary power proposal. These factors are so slight that they have no decisional significance under the circumstances of this proceeding.

the licensee of a full-time AM station in the community proposed to be served by that applicant. 80 FCC 2d, *supra* at 121.

3. In *Bill Garrett Broadcasting Corp.*, 16 FCC 2d 415, 420 (1969), the Commission said "that the desirability of permitting a daytime only standard broadcast station,. . . to build a companion FM facility in order to provide a full-time service for its community diminishes the impact that would otherwise flow from such a proposal." In sum, while the Commission generally prefers applicants with a broadcast interest outside the community of license over applicants with an existing station in the designated community, the cases cited by Gobbler establish that where both applicants already provide some service to the community in question, provision of a new nighttime voice is a factor meriting diversification credit. *Garrett* further holds that the adverse impact that would otherwise flow from an application by the licensee of an existing station in the community of license is diminished when that existing station is limited to daytime only operation.

4. This proceeding involves two applicants who are existing licensees in the area. Each applicant is already providing Cuero with some service. Although J. B. is licensed in Cuero and is required to meet the needs of that community, the detriment that would ordinarily flow from its proposal to operate a second station in Cuero is diminished by the fact that, as the owner of a daytime only station, construction of a companion FM station is the only means by which J. B. can provide a full-time service for Cuero. On the other hand, Gobbler's UHF television station is not licensed to Cuero and it does not provide a transmission service for that community, but it does place a Grade B signal over that entire community. In this regard, television, because of the limited number of channels available, is regarded as a regional service and licensees, such as Gobbler, are expected to be concerned with the needs and interests of all people within their service contours.[2] If Gobbler were awarded the license for the new FM station in Cuero, it would be able to program two full-time voices to attract an audience in Cuero by addressing issues of interest to that community. Under these circumstances, we believe that our diversification policy is best served by granting J. B. its first full-time facility rather than providing Gobbler with its second. The diversification advantage enjoyed by J. B. is a narrow one, but with neither applicant proposing to integrate

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[2] *The Evening Star Broadcasting Co.*, 27 FCC 2d 316, 321, n.5 (1971), *affirmed sub nom.*, *Stone* v. *FCC*, 466 F.2d 316, 327–28 (C.A.D.C. 1972).

more than a minuscule fraction of its ownership, that edge is decisive.

5. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed May 21, 1985 by J. B. Broadcasting of Texas, Inc. IS GRANTED and the Review Board's Decision, FCC 85R-32, 100 FCC 2d 822 (1985), IS MODIFIED as reflected above.

6. IT IS FURTHER ORDERED, That the application of J. B. Broadcasting of Texas, Inc. (File No. BPH-821026AQ) for a construction permit for a new FM station at Cuero, Texas IS GRANTED, and the application of Gobbler Communications Company (File No. BPH-830214AA) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Dismissal of Application, Appeal From, Granted
Transmitter Site, Amendment, Granted

Review Board grants appeal from and vacates ALJ's order dismissing applications based on his previous denials of leave to amend to specify new transmitter sites. Board found that amendments should have been accepted because loss of previous site was unforeseeable and amendments were otherwise attended by good cause.

—*Mary Ann S. Bohi*
MM Docket No. 84-666

FCC 86R-21

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of MARY ANN S. BOHI *et al.*	MM DOCKET NO. 84-666 MM DOCKET NOS. 84-668 to 84-673 MM DOCKET NO. 84-676
For a Construction Permit for a new television station to operate on Channel 50, Tampa, Florida	

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1986; Released: April 11, 1986.

BY THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL ISSUING A SEPARATE STATEMENT.

1. The Review Board has under consideration two related appeals filed February 10 and 11, 1986, by Tampa Fifty, Ltd. (T-50) and Community Broadcasters of Tampa, Inc. (Community),

respectively, from a Memorandum Opinion and Order[1] by Administrative Law Judge (ALJ) Joseph P. Gonzalez dismissing their applications in this proceeding. The Order noted that T-50 and Community previously had been denied leave to specify new antenna sites.[2] Concluding that the applicants, by their own admission, lacked viable antenna sites and were therefore unqualified to be Commission licensees, the ALJ granted a motion filed July 25, 1985 by competing applicant Mary Ann S. Bohi (Bohi), requesting dismissal of their applications. Oppositions to the appeals were filed by three other competing applicants: Gulfwind Broadcasting Ltd. (Gulfwind), Tampa Bay Broadcast, Ltd. (Tampa Bay), and Jacaranda Broadcasting Company (Jacaranda). For the reasons set forth below, we will reverse the ALJ's ruling.[3]

2. *Background.* On December 1, 1983, the Moody Bible Institute of Chicago (Moody), licensee of Station WKES(FM), St. Petersburg, Florida, filed an application for a construction permit to relocate its antenna to a new proposed tower site. *See* Community's Consolidated Opposition to Motions to Enlarge and to Dismiss (Community's Opposition), filed August 14, 1985 at Exhs. 1 and 3 (attached to T-50's appeal.) Moody's subsidiary company, High Tower, Inc. (HTI), held an option to purchase the land where the tower would be constructed, and was the Moody entity intended to construct the tower. *Id.* at Exh. 1. Moody's general manager for the St. Petersburg FM station, C.W. Caldwell, is the president of HTI. *Id.* Prior to April 13, 1984, the date on which Community[4] and T-50 filed their applications

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[1] *Mary Ann S. Bohi*, FCC 86M-449, released February 4, 1986.

[2] *Gary E. Willson*, FCC 85M-2667, released July 1, 1985; *Gary E. Willson*, FCC 85M-2671, released July 2, 1985.

[3] In the wake of the numerous pleadings submitted in connection with the instant appeals, we note that we recently admonished an applicant for filing a 17-page appeal that was, as here, simultaneously accompanied by a motion to exceed the page limitation. *See Horizon Broadcasting, Inc.*, FCC 86R-12, released March 18, 1986, at n. 7. There we remarked that the appeal was not so unusual or complicated as to necessitate a pleading more than three times the 5-page limitation prescribed by 47 CFR § 1.301. That observation is equally apt here. Future applicants who file oversized appeals without *prior* authorization are reminded that such appeals are subject to dismissal. In this proceeding, the ALJ chastised both T-50 and Community for their nonspecific and unsupported recitation of the events leading up to the challenged site amendments. Nevertheless, even with both appellants exceeding the page limitation, their pleadings have poorly described critical dates and conversations between the various participants, and we can only conclude that such deficiencies contributed in great part to the ALJ's adverse rulings.

[4] Community is the successor-in-interest to Associated Communications Corporation (ACC), the entity that filed the original application. ACC holds the majority of the voting stock and ownership interest in Community.

herein, Monroe Berkman, Community's vice-president and the individual generally responsible for Community's application, and George Miles, a general partner of T-50, contacted Caldwell and were told that their respective applicants could use the tower contemplated for Moody's St. Petersburg FM facility. *See* Community Opposition, *supra*, at Exh. 1; T-50's November 16, 1984 Opposition to Petition to Enlarge Issues Against Tampa Fifty, Ltd. (T-50's Opposition) at Exh. A (attached to T-50's appeal). Additionally, T-50 obtained a written option from HTI to use space on the tower if T-50's application was granted. *See* T-50's Opposition, *supra*, at Exh. A. Thereafter, while Moody's application for the site change was still pending before the Commission, its affiliated company HTI, and Ronald Crider, an individual in the business of leasing space to broadcasters on a tower he owns in Miami, reached an agreement in principle whereby Crider would assume HTI's option, construct the tower, and lease the space on the tower to Moody (for its FM facility) and other interested parties. *See* Community Opposition, *supra*, at 3. By letter dated July 19, 1984, Caldwell returned the check for the option to T-50 and informed it that he would no longer be pursuing the erection of the proposed tower but that Crider was in the process of purchasing the land. *See* T-50's Opposition, *supra*, at Attachment 2. Caldwell provided Crider's address in his letter to T-50. *Id.*[5] Upon receiving this information, both T-50 and Community promptly contacted Crider and received assurances from him that their applicants could still use the tower when it was constructed. *See* Community's Opposition, *supra*, at Exh. 1; T-50's Opposition, *supra*, at Exh. A. Additionally, T-50 obtained a written option dated August 30, 1984 from Crider, similar to the one it had previously secured from HTI. *See* T-50's Opposition, *supra*, at Exh. A and Attachment 3.

3. On October 15, 1984, the Commission granted Moody's application for Station WKES(FM), thereby authorizing it to relocate to the newly proposed tower site. *See* Community's Opposition, *supra*, at Exhs. 4 and 5. However, in November 1984 negotiations between Moody's company and Crider had reached an impasse and there was some doubt as to which company would eventually construct the tower. *Id.*, at Exh. 1; T-50's Opposition, *supra*, at Attachment A. T-50 filed with the Commission a Notification Pursuant to Section 1.65 on November 16 to that

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[5] On approximately the same date, that is, July 18, 1984, the Commission released its Hearing Designation Order, Mimeo No. MM-5413, in this proceeding.

effect. Caldwell, nonetheless, continued to advise both applicants that they could still use the tower. *See* T-50's Opposition, *supra*, at Exh. B; Community's Opposition, *supra*, at Exh. 1. He subsequently informed the two parties that Moody, itself, rather than its subsidiary company, HTI, might build the tower; and in January 1985, he informed Community that Moody's Board of Directors had voted that Moody would build the tower itself. *See* Community's Petition for Leave to Amend, filed June 11, 1985 at 3 (attached to T-50's appeal). On January 31, 1985, however, Moody reversed its decision to construct the tower, deciding instead that the proposed modification of its St. Petersburg FM facility was not feasible at that time. *See* Community's Opposition, *supra*, at Exh. 5. Moody, therefore, requested that the Commission rescind its construction permit, *id.*, and HTI thereupon sold the option back to the site owners. *Id.* at Exh. 1. On February 26, 1985, T-50 learned from Caldwell's assistant that Moody had decided not to continue with its modification plans and that its subsidiary company HTI was no longer pursuing the idea of constructing a tower. *See* T-50's Motion for Leave to Amend, filed April 19, 1985 at affidavit of Joseph Godles (attached to T-50's appeal). In a March 28, 1985 Notification Pursuant to section 1.65, T-50 informed the parties and the ALJ that the tower would not be built and that it was in the process of securing an alternative site.

4. Upon receiving this information, Community contacted Caldwell and inquired whether it could pick up the option but was informed that the owner was not interested. *See* Community's Opposition, *supra*, at Exh. 1. Both applicants then immediately sought to locate a new tower site, and filed their respective amendments specifying new sites on April 19, 1985 (T-50) and June 11, 1985 (Community). By Orders, FCC 85M-2667, *supra*, and FCC 85M-2671, *supra*, the ALJ rejected T-50's and Community's amendments, respectively, concluding that the "unforeseeability" and good cause requirements of Section 73.3522(b) of the Commission's Rules, 47 CFR § 73.3522(b), had not been met by either applicant.[6] He found that the need to file the amendments was foreseeable as early as July 1984 when HTI

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[6] The traditional test for "good cause" mandates a showing that: (1) the amendment was prepared with due diligence; (2) was not required by the voluntary act of the applicant; (3) will not necessitate modification or addition of issues or parties; (4) will not disrupt the orderly conduct of the hearing or necessitate additional hearing; (5) will not unfairly prejudice other parties; and (6) will not cause the applicant to gain a comparative advantage. *See Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

initially informed the parties that it would not construct the tower. Moreover, he faulted both applicants for lacking in diligence when they failed to seek a new site immediately after being alerted to the impasse in negotiations between HTI and Crider in November 1984. Finally, he faulted T-50 because it failed to disclaim a comparative advantage it would receive over the other applicants for the additional coverage its new site would provide. Seven months later, the ALJ granted Bohi's motion to dismiss the two applications because both lacked a viable antenna site. See FCC 86M-449, *supra*, released February 4, 1986. The instant appeals ensued.

5. In their appeals, T-50 and Community contend that the ALJ erred in rejecting their respective site amendments. Both assert that the loss of the site was not foreseeable, that they acted with due diligence in securing a new site promptly after their original site became unavailable, and that the equities present here strongly favor acceptance of the site amendments. Moreover, T-50 argues that its claim for a comparative coverage preference was appropriate under then applicable Commission precedent, citing *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 799-803, 57 RR 2d 662, 678-681 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 469, 57 RR 2d 1363 (1985), and provided no basis for rejecting the amendment. It asserts that it submitted a dual coverage showing — one including the coverage gain area and another omitting it — and points out that it was only subsequently in *Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 732-733 (1986), that the Commission reversed the coverage aspect of the Board's *Santee Cooper* opinion and held that an applicant is not entitled to greater comparative coverage credit than it originally proposed. The applicants in opposition agree with the ALJ's findings on foreseeability and lack of diligence.

6. We concur with T-50 and Community that the ALJ erred both in finding that the loss of the site was foreseeable in July 1984 when Caldwell originally informed T-50 that HTI would not construct the tower, and in concluding that the appellants were lacking in diligence for not beginning their search for a new site in November 1984 after negotiations between HTI and Crider had reached an impasse. Except for a few superficial arguments noted in passing,[7] neither respondents nor the ALJ seriously suggests

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[7] For example, the alleged conditional language of T-50's option and the appellants' failure to secure an agreement with the actual site owner are erroneously cited as reasons to indicate that neither appellant ever had reasonable assurance of its transmitter site. The option, to the extent that it

that either applicant was lacking "reasonable assurance" of its transmitter site when T-50 and Community reached agreements with representatives of Moody (or its subsidiary, HTI) concerning the use of space on the tower proposed for Moody's St. Petersburg FM facility. Moody had amply demonstrated its intention to have a new tower constructed and its antenna relocated to that tower by virtue of its application for a constuction permit for WKES(FM) and its actions in having its subsidiary company HTI secure an option to purchase the site where the tower was proposed. With regard to foreseeability, we do not agree with the ALJ that the letter dated July 19, 1984 from Caldwell, informing T-50 that he would not pursue the erection of the proposed tower, was sufficient warning to alert the two applicants that the tower would never be constructed. Moody was at all times the interested party in having the proposed tower constructed and there was no indication in July 1984 that its plans for its site relocation had been altered. Certainly, it did not request the Commission to dismiss its application for the construction permit which was then still pending; and there is unrebutted evidence that as late as January 1985 Moody still intended to proceed with its license modification. Its subsidiary continued to hold an option on the land in the event it (HTI) would be required to construct the tower. Moreover, both T-50 and Community had received assurances from Crider after receipt of Caldwell's letters that they could use space on the tower if it were constructed by him. In light of these facts, we cannot find that Moody's decision to have Crider rather than its own subsidiary build the tower constituted a sufficient portent of doom to cause the applicants to commence a search for a new transmitter site; either way, there was an intention by Moody, the crucial party here, that the tower would be built. Thus, we find no

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includes language permitting flexibility to the tower owner should something unforeseen occur, is acceptable since an applicant need not have a binding agreement or absolute assurance. *See Professional Radio, Inc.*, 59 RR 2d 1173, 1177-1179 (Rev. Bd. 1986) (noting inherent tension between objectives of site owner to prevent undesirable binding situation and counter objective of applicant to demonstrate transmitter site availability). In any event, T-50, as well as Community, had an oral agreement to use the site prior to T-50's securing of the option. *See William R. Gaston*, 35 FCC 2d 615, 620 (Rev. Bd. 1972) (oral agreement sufficient to establish availability). The cases cited by respondents to support their claim that an applicant must know the name of the site owner before specifying the site are unavailing. In each case cited, it was the landowner from whom the applicant had to obtain permission to use the site, whereas here the applicants were properly dealing with other individuals who had authority both to construct the tower on the site and to select the tower tenants.

legal basis for faulting T-50 or Community for continuing to proceed as though Moody's proposed tower would be constructed.

7. Similarly, we are not persuaded that the November 1984 negotiations impasse between Crider and HTI was the proper starting date for determining whether T-50 and Community were lacking in diligence. It appears reasonably clear to us, after our own examination of the voluminous material submitted by T-50 with its appeal, that the appellants were continuously reassured by Caldwell, either in his role as president of HTI, which continued to hold an option on the land, or in his role as general manager of Moody's FM facility proposing to relocate on the proposed tower, that the tower would be built and that T-50 and Community would have space on that tower. Moody had received its construction permit in late October 1984 and had not given any warning that it would forgo its recently authorized site change. It was not until January 31, 1985 that Moody abruptly and unexpectedly abandoned its proposed modification of Station WKES(FM)'s facilities. On the basis of the pleadings before us, we cannot find that either T-50 or Community lacked diligence in locating new antenna sites or in filing their amendments.[8] Finally, the only other element of the good cause test, *see* n. 6, *supra*, on which the ALJ faulted either of the applicants was the comparative preference T-50 claimed for its superior coverage from its new proposed site. That potential difficulty, however, has now been removed by the Commission's recent holding in *Women's Broadcasting Coalition, Inc., supra*, disallowing such post-cutoff comparative upgrading.[9]

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[8] It is not controverted that both applicants acted diligently in acquiring new sites after the February 1985 date when T-50 first learned that the tower would not be built.

[9] We have also reviewed briefly the other elements of the good cause test (not discussed by the ALJ), and find that they provide no impediment for acceptance of the amendments. The amendments were not required by the voluntary act of the applicants. They will not unfairly prejudice the other parties since no applicant has a vested interest in the disqualification of a competing applicant. *See Azalea Corporation*, 31 FCC 2d 561, 563, 22 RR 2d 909, 911 (1971). And the amendments when filed would not have disrupted the proceeding since they were filed well before the commencement of the next hearing session. The only element requiring any discussion at all is the potential addition of a new hearing issue. We note in this regard, for example, that Jacaranda claims in its opposition to T-50's petition for leave to amend that an FAA air hazard issue would be required. However, in light of the fact that the joint engineering amendments apparently still have not been introduced into evidence, the disruption caused by a new issue would be minimal and does not provide a basis here for rejecting the amendments. *See California Broadcasting Corp.*, 90 FCC 2d 800, 810 (1982) (addition of issue did not require rejection of amendment).

8. Furthermore, the Commission has indicated previously that good cause must be examined in light of the equities of the case, *see Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489, 49 RR 2d 1589, 1594 (1981), and here those equities favor acceptance of the amendments. T-50, and to a lesser extent Community, continued to have ongoing contacts with the individuals proposing to construct the tower, kept the Commission and all of the parties advised as to ensuing developments, and took what must be considered as reasonable steps in ensuring that they continued to have access to the proposed tower site. This is to be contrasted with *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983) (subsequent history omitted), and *Horizon Broadcasting, Inc., supra*, where site amendments were properly rejected. In *Shoblom*, the applicant waited approximately seventeen months before it conceded that its originally proposed site was not available. And in *Horizon*, at para. 7, the applicant "simply put off examining and resolving a fundamental problem with its application until a too-late date." In sum, T-50 and Community established good cause for acceptance of their site amendments; therefore, the Order dismissing the applications for lack of a viable transmitter site is vacated.

9. ACCORDINGLY, IT IS ORDERED, That Tampa Fifty, Ltd.'s Appeal as of Right from Presiding Judge's Interlocutory Ruling, filed February 10, 1986, by Tampa Fifty, Ltd. and the Interlocutory Appeal as of Right, filed February 11, 1986 by Community Broadcasters of Tampa, Inc. ARE GRANTED; and

10. IT IS FURTHER ORDERED, That the motions for leave to exceed page limitation filed February 10 and February 11, 1986 by Tampa Fifty, Ltd. and Community Broadcasters of Tampa, Inc., respectively, ARE GRANTED; that the motion for leave to file motion for leave to exceed page limitation out of time, filed February 14, 1986 by Tampa Fifty, Ltd. IS GRANTED; that the request for stay and for ex parte consideration, filed February 10, 1986 by Tampa Fifty, Ltd. IS DENIED; and that the motion for leave to file a reply, filed February 14, 1986 by Tampa Fifty, Ltd. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Separate Statement
of
Board Member Norman B. Blumenthal

Under the circumstances meticulously reviewed and described in the attending order, I agree that the appellants have shown that they should have been permitted to amend their transmitter site specifications.

As the bar is by now aware, both the Board and the Commission have no compunction against disqualifying an applicant where it is shown that such applicant had no legitimate basis whatever for claiming that it had "reasonable assurance" to a transmitter site it had claimed as likely available to it. *See, e.g., Shoblom Broadcasting, Inc.*, 95 FCC 2d 444 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984 (Comm'n), *aff'd mem. sub nom. Royce International Broadcasting Co.* v. *FCC*, 762 F.2d 138 (D.C. Cir. 1985).*

Conversely, where the facts and background circumstances demonstrate that an applicant (or applicants) have proceeded with good faith with respect to their specified transmitter sites, lacking neither initial "reasonable assurance," nor substantial candor, nor diligence, the Board has found for the applicant(s). *E.g., Arizona Number One Radio, Inc.*, FCC 86R-16, released March 26, 1986, at paras. 3-6; *Ithaca TV Associates*, 101 FCC 2d 709, 712-716 (Rev. Bd. 1985) (petitions for reconsideration denied) (application for Comm'n review pending).

Each case must be very carefully evaluated on its surrounding facts; and it would be a serious mistake to read the Board's action here as a sign that we will not firmly enforce the rule reflected in 47 CFR § 73.3522(b) or the Commission's policy set forth in *Belo Broadcasting Corp.*, 68 FCC 2d 1313 (1978). *See also California Broadcasting Corp.*, 90 FCC 2d 800 (1982). However, under *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489 (1981), acceptance of the instant appellants transmitter site amendments here would have been more in keeping with the equitable principles called for therein.

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* For other recent examples where the Board has squarely applied the "reasonable assurance" standard and found against an applicant, *see Cannon Communications Corp.*, 101 FCC 2d 169, 171-177 (Rev. Bd. 1985) (applications for Comm'n review pending); *Houston Family Television, Ltd.*, 101 FCC 2d 661, 663-665 (Rev. Bd. 1985) (applications for Comm'n review pending); *Dutchess Communications Corp.*, 101 FCC 2d 243, 249-254 (Rev. Bd. 1985); *South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840 (Rev. Bd. 1984).

Exchange Carrier Association

This *Report and Order* describes the principles that are applicable to determining the compensation that is to be received by exchange carriers that elect to be compensated under the average schedules, and describes the prohibitions (effective January 1, 1988) that are contained in sections 69.605(c)(1) and 69.605(c)(2) of the Commission's rules.
—MTS/WATS Market Structure
CC Docket No. 78-72

Exchange Carrier Association

Section 69.605(c)(1) prohibits an exchange carrier from receiving compensation under the average schedules if an affiliated exchange carrier receives compensation on the basis of cost data where the combined annual operating revenues of the affiliated exchange carriers are equal to, or greater than, $40,000,000.
—MTS/WATS Market Structure
CC Docket No. 78-72

Exchange Carrier Association

Section 69.605(c)(2) prohibits an exchange carrier, after December 31, 1987, from receiving average schedule compensation if it receives compensation for interstate exchange access services on the basis of cost data.
—MTS/WATS Market Structure
CC Docket No. 78-72

FCC 86-177

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of MTS and WATS Market Structure: Average Schedule Companies	CC Docket No. 78-72, Phase I

REPORT AND ORDER

Adopted: April 11, 1986; Released: April 18, 1986

BY THE COMMISSION:

I. Introduction

1. This Report and Order addresses revisions to the average schedules that were proposed by the National Exchange Carrier Association ("NECA") on September 17, 1985,[1] and two sets of issues that relate to those portions of our access charge rules that prohibit exchange carriers from receiving average schedule compensation and cost settlement compensation.[2] In this Report and Order, we approve the September 17, 1985 revisions to the average schedules.[3] We have also reaffirmed our earlier prohibition against permitting individual exchange carriers to be compensated on the basis of individual cost studies for some services and the average schedule for others. That prohibition will, however, not take effect until January 1, 1988. We also reaffirm the requirement that all affiliated exchange carriers be compensated either under the average schedules or on the basis of cost studies. However, in light of the concerns that were expressed by the Court of Appeals for the D.C. Circuit and the evidence that was provided by the Rural Telephone Coalition in response to our *Notice*,[4] we have concluded that the prohibition should not extend to affiliated exchange carriers that collectively have less than $40,000,000 in annual operating revenues.

II. Background

A. Revisions to the Average Schedules.

2. Average schedule companies are those exchange carriers that have been assumed, because of their small size, not to have sufficient financial resources or expertise to justify a requirement that they perform jurisdictionally separated cost studies for determining their compensation in originating and terminating

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[1] The revisions were filed pursuant to the requirement that is contained in section 69.606(b) of our rules, 47 C.F.R. § 69.606(b) (1984).

[2] *See* sections 69.605(c)(1)-(2) of our rules, 47 C.F.R. §§ 69.605(c)(1)-(2) (1984).

[3] In addition, we have also directed NECA to file proposed revisions for line haul and special services.

[4] Notice of Proposed Rulemaking in CC Docket No. 78-72, Phase I, FCC 84-604 (released December 28, 1984) at paras. 8-10 (hereinafter "*Notice*"). *See generally, Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F. 2d 1095, 1127-29 (D.C. Cir. 1984).

interstate telecommunications services. Historically, in recognition of the limitations that average schedule companies face, this Commission permitted those companies to be compensated on the basis of jurisdictionally separated cost characteristics that were deemed to be representative of an "average" exchange carrier of limited size. This procedure had the advantage of substantially reducing the costs that were imposed upon small exchange carriers in receiving compensation for their interstate services, with the concomitant benefit to the public of reducing the expenses of accounting and separations studies that otherwise would have to be borne, in part, by interstate ratepayers.

3. On November 14, 1983, we accepted revisions to the average schedules that had been filed by the American Telephone and Telegraph Company pursuant to section 69.606(b) of our rules.[5] Those schedules consisted of compensation arrangements that were divided into three parts: "Schedule A" functions (local exchange facilities for originating and terminating MTS and WATS messages); "Schedule B" functions (toll operations, automatic ticketing, automatic number identification, and intertoll dial switching equipment); and "Schedule C" functions (interexchange facilities services, or "line haul" functions). In addition, a separate compensation arrangement covered private line services (*e.g.*, voice grade private line, remote metering, and data services that were provided under nationwide or statewide toll rate schedules ("Special Services Settlement Plan")).

4. Under the current average schedules, compensation for non-traffic sensitive ("NTS") plant is largely determined by the number of interstate messages that are reported by average schedule companies.[6] This "usage-sensitive" characteristic of the average schedules results in average schedule companies recovering compensation from the carrier common line pool that increases with the number of interstate messages that are carried, despite the fact that the underlying NTS costs do not increase as the number of messages increase. This compensation mechanism for NTS costs is not congruent with the principles that are, in the aggregate, applicable to cost companies.[7] As a consequence, at the time that we adopted our access charge rules, we required that

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[5] Section 69.606(b) of the Commission's rules and regulations, 47 C.F.R. § 69.606(b) (1984).

[6] *See generally* National Exchange Carrier Association ("NECA") Modifications of Average Schedules at 4-10; NECA Reply Comments at 4-5; RTC Comments at 3.

[7] *See generally*, sections 69.1 — 69.502, 69.605(a)-(b), and 69.607 — 69.610 of our rules, 47 CFR §§ 69.1 — 69.502, 69.605(a)-(b), and 69.607 — 69.610 (1984).

the formula for compensating average schedule companies "be designed to produce disbursements to an average schedule company that simulate" the compensation that would otherwise be received under our rules by a cost company "that is representative of average schedule companies."[8] In other words, average schedule companies are to receive compensation that is patterned after the compensation that a cost company would receive. Thus, the thrust of that rule was that average schedule companies are not to receive settlements for NTS plant that are driven by the number of messages that traverse that NTS plant.[9] To accomplish these objectives, the National Exchange Carrier Association ("NECA") was directed by rule to file revised average schedules with this Commission that were consistent with these standards.[10] On September 17, 1985, NECA filed modifications to those average schedules[11] to reflect the requirement under our rules that the average schedules simulate the compensation that would be received by a cost company under Part 69 of our rules.[12] In accordance with those requirements, NECA related the compensation for the carrier common line portion of Schedule A to the number of access lines that are provided by exchange carriers, as contrasted with the earlier procedure of compensating average schedule companies on the basis of message volumes for that plant.[13] NECA has requested that these changes become effective June 1, 1986.

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[8] Section 69.606(a) of the Commission's rules, 47 C.F.R. § 69.606(a) (1984).

[9] *See* Memorandum Opinion and Order in the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 83-356 (released August 22, 1983) at paras. 194, 196.

[10] We further required that proposed revisions to the average schedule be submitted annually, or, in the alternative, that a majority of the directors of the National Exchange Carrier Association certify that it believes that no revisions are warranted. *See* section 69.606(b) of the Commission's rules, 47 C.F.R. § 69.606(b) (1984).

[11] The average schedules that are presently in effect were accepted on November 14, 1983. *See* Memorandum Opinion and Order in the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 83-509 (released November 14, 1983) (hereinafter "*1984 Formula Approval Order*") at para. 9.

[12] *See* section 69.606(a) of the Commission's rules and regulations, 47 C.F.R. § 69.606(a) (1984). *See generally* MTS and WATS Structure, Third Report and Order, 93 FCC 2d 241 (1983) (hereinafter "*Access Charge Order*"), *modified on reconsideration*, 97 FCC 2d 682 (1983) (hereinafter "*First Reconsideration Order*"), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (hereinafter "*Second Reconsideration Order*"), *aff'd in principal part and remanded in part, Nat'l Ass'n of Regulatory Utility Comm'rs* v. *FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224, 105 S. Ct. 1225 (1985), *modified on further reconsideration*, 49 Fed. Reg. 46,383 (1984) 50 Fed. Reg. 18,249 (1985) (hereinafter "*Third Reconsideration Order*"), *aff'd on further reconsideration*, 50 Fed. Reg. 43,707 (1985), *appeal docketed, U.S. Telephone Inc. v. FCC*, No. 84-1115 (D.C. Cir. March 23, 1984).

B. Prohibitions Against Mixed Compensation Arrangements.

5. In the furtherance of the basic policy objectives discussed above, we also required in section 69.605(c) of our rules that: (1) affiliated exchange carriers settle either on a cost basis for all companies or on an average schedule basis for all companies (*i.e.*, a company cannot elect average schedule status if it is affiliated with a cost company); and (2) average schedule companies be compensated under the average schedule for all settlement purposes (*i.e.*, a company cannot select average schedule status for some functions but not for others).[14] However, recognizing that a transition period would be necessary to effect those changes, we waived the application of those rules pending receipt of conforming average schedules and a re-examination of the premises that underlay the prohibitions against mixing cost and average schedule compensation arrangements.[15]

6. In affirming in principal part our *Access Charge Decision*, the Court of Appeals expressed two concerns with respect to section 69.605(c) of our rules.[16] With respect to section 69.605(c)(1), the Court questioned whether we had an adequate basis for concluding that a small average schedule company would have the resources to perform cost studies through an affiliation with a small cost company.[17] Second, with respect to the

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[13] *See* NECA Modification of Average Schedules, Appendix A at 14; NECA Modification of Average Schedules at 7. *See generally* NECA Modification of Average Schedules, NECA Reply (dated January 6, 1986), *passim.*

[14] *See First Reconsideration Order* at paras. 193-196; section 69.605(c) of the Commission's rules, 47 C.F.R. § 69.605(c) (1984). *See also Notice* at paras. 8-10.

[15] Order Granting Waiver in the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, FCC 84-77 (released March 9, 1984) at paras. 5-6; Order Waiving Application of Rule in the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, No. 1704 (released December 27, 1985) at para 2. *See generally*, *Notice* at paras. 8-10; *Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC*, 737 F.2d 1095, 1127-29 (D.C. Cir. 1984) (hereinafter, "*NARUC*").

[16] *NARUC* at 1127-1129.

[17] *Id.* at 1128. The Rural Telephone Coalition ("RTC") had argued that "state commissions may not allow revenues of locally regulated exchange companies to be diverted to fund the operations of affiliated companies in other jurisdictions." *See id.* The relevance of this observation is not apparent in the context of distributions of interstate revenues from services that are not regulated by state commissions. *See Wyoming Hospital Ass'n v. Harris*, 527 F. Supp. 551, 557 (D. Wyo. 1981), *aff'd*, 727 F.2d 936 (10th Cir. 1984); *accord*, *Free v. Bland*, 369 U.S. 663, 668 (1962) *See also California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert denied*, 434 U.S. 1010 (1978); *North Carolina Utilities*

provision in section 69.605(c)(2) that an exchange carrier cannot settle under the average schedules for some, but not all, interstate exchange service functions,[18] the Court noted that some average schedule companies might have "exceptionally high line haul costs" and that "forcing exclusive reliance on the average schedule" could "gravely affect" those companies.[19] In this regard the Court, *inter alia*, observed that possibly "the average schedules can themselves be adjusted to reflect the new cost elements identified by the Commission."[20] In response to the Court's concerns, we requested comments as to whether we should delete sections 69.605(c)(1)-(2) from our rules or modify those sections in some respect.[21]

II. Discussion

A. Revisions to the Average Schedules.

7. As discussed above, NECA proposes altering the present settlement approach for average schedule companies to a compensation arrangement that more closely simulates the compensation principles that apply to cost companies (*e.g.*, access lines for common line, minutes for traffic sensitive plant, and messages for billing functions).[22] The NECA proposal also contains transition compensation for carriers that would extend, in diminishing amounts, through a four-year period for companies that would otherwise experience more substantial reductions in compensation as a consequence of the revisions that NECA proposes.[23] Five comments, and five reply comments, were filed in response to NECA's proposed modifications to the average schedules.[24] In

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Comm'n v. FCC, 737 F.2d 787, 794-96 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). This is particularly true in light of the fact that exchange carriers that choose to settle, or that are required to settle, on a cost basis for interstate services may include all reasonable expenses that are incident to the provision of those services (including the expenses that are associated with studies that determine the costs of providing interstate exchange access services), and receive compensation on that basis.

[18] *See* section 69.605(c)(2) of our rules, 47 C.F.R. § 69.605(c)(2) (1984).

[19] *NARUC* at 1129.

[20] *Id.*

[21] *Notice* at paras. 8-10.

[22] *See* NECA Modification of Average Schedules, NECA Reply Comments, and RTC Comments, *passim*.

[23] *See* NECA Modification of Average Schedules at 18-21.

[24] Initial comments were filed by the American Telephone and Telegraph Company ("AT&T"), ICORE, Pine Tree Telephone and Telegraph Company ("Pine Tree"), United States Telephone Association ("USTA"), and the Rural Telephone Coalition ("RTC'). Reply comments were filed by ALLTEL Corporation ("ALLTEL"), the ICORE local exchange companies, NECA, the RTC, and

general, those parties favoring the adoption of the proposed revisions note that the new average schedules are based upon more current data, were designed to correspond to Parts 67 and 69 of the Commission's rules, and that future modifications to Parts 67 and 69 would be incorporated through continuing revisions to the average schedules.[25]

8. Parties opposing the average schedule revisions contend, generally: (1) that the underlying methodologies, studies, and data that were employed by NECA in developing its proposed revisions to the average schedule were flawed;[26] (2) that the revisions to the average schedules did not include an update of the "line haul" or Schedule C functions;[27] (3) that the transition that is contemplated in the schedules is too short;[28] and (4) that there should be no transition adjustment to ameliorate the impact of the new average schedules upon small telephone companies.[29] We will discuss each of these concerns *seriatim*.

9. First, there is little doubt that improvements are possible in the studies, methodologies, and data that NECA employed in developing new average schedules.[30] However, no party disputes the fact that revisions to the average schedule are required.[31] The

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Southwestern Bell Telephone Company ("Southwestern"). On February 7, 1986, ICORE filed a motion under section 1.45(c) of the Commission's rules to file additional comments. If granted, ICORE's motion would require another round of responsive pleadings, and engender further delay. Repetitive pleadings and attempts to supplement the record, out of time, are not actions that this Commission wishes to encourage. Accordingly, the ICORE motion of February 7, 1986, is denied. *Accord* Rural Telephone Coalition Motion to Deny (filed February 14, 1986); NECA Opposition (filed February 14, 1986). ICORE's other motions in this proceeding have been granted to the extent indicated in this, and prior, orders and are otherwise denied.

[25] ALLTEL Comments at 2-8; RTC Comments at 3-4; NECA Reply Comments at 18-20, 22-24; RTC Reply Comments at 1-11; Southwestern Reply Comments at 1-4, 18-20, 22-24.

[26] AT&T Comments at 1-5; ICORE Comments at 17-28; ICORE Reply Comments at 5-11, 15-21; 24-25; Pine Tree Comments at 2-5.

[27] ICORE Comments at 13-16; Pine Tree Comments at 1-3.

[28] ICORE Comments at 5-12; ICORE Reply Comments at 3-4, 12-15, 22-24. *Accord* ICORE Comments at 15-17; Pine Tree Comments at 3.

[29] AT&T Comments at 5-7.

[30] *See* AT&T Comments; ICORE Comments; ICORE Reply Comments; Pine Tree Comments, *passim. Compare* ALLTEL Reply Comments at 3-9; NECA Modification of Average Schedules (filed September 17, 1985); NECA Reply Comments at 2-20.

[31] Among other things, our rules require modifications to the average schedules. Section 69.606 of the Commission's rules, 47 C.F.R. § 69.606 (1984). *See* para. 4, *supra*. ICORE argues, *inter alia*, that NECA is incorrect in proposing compensation for average schedule companies that is based upon access lines, rather than "the current average-revenue-per-message methodology", since "nothing in the pleadings or data NECA has filed justifies this assumption." ICORE Comments at 19. NECA was not required to justify that assumption."

critical question thus becomes whether the NECA proposed revisions to the average schedules are an improvement over the existing schedules.[32] We conclude that they are. Our reasons for this assessment mirror, in large measure, the reasons that have already been stated in the supporting comments.[33] In brief, the NECA revisions: (1) more closely simulate the principles that are contained in Part 69 of our rules; (2) take more fully into account the effects of changes in jurisdictionally separated costs under Part 67 of our rules that have occurred since the last revision to the average schedules; (3) use more recent data; and (4) employ a residue ratio that more closely parallels the residual risk sharing that occurs under cost company pooling.[34]

10. Second, several commenting parties[35] express concern that final revisions to the Schedule C or "line haul" portions of the average schedules were not included in NECA's September 17 filing, with the consequence that average schedule companies could not assess the total effect of all potential changes[36] to the average schedules in deciding whether to elect average schedule status.[37] Evidently, NECA has been waiting to receive data from average schedule companies that would permit it to revise settlement disbursements for line haul and special access services, a process that should conclude shortly.[38] In light of the time that has already elapsed since Schedule C was comprehensively revised (1957), we do not think that further delay in revising the line haul and special access portions of the average schedules is desirable. Accordingly, we direct that proposed revisions for the line haul

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Our rules require that average schedule compensation be designed to simulate cost company compensation for interstate services, which is based on investment in access lines and not traffic carried over those lines. Thus, our rules direct the abandonment of the per message basis for compensation. *See* section 69.606 of the Commission's rules, 47 C.F.R. § 69.606 (1984); section 405 of the Communications Act of 1934, 47 U.S.C. § 405 (1984). *See also* NECA Modification of Average Schedules at 9-11.

[32] As the D.C. Circuit has instructed this Commission, "the best must not become the enemy of the good, as it does when the FCC delays making any determination while pursuing the perfect tariff." *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 343 (1980). *See NARUC* at 1147.

[33] *See* n.25, *supra*.

[34] *See* sections 69.607-69.610 of our rules, 47 C.F.R. §§ 64.607-69.610 (1984).

[35] ICORE Comments at 13-16; Pine Tree Comments at 1-3.

[36] The fact that NECA did not file revisions to all portions of the average schedules does not, and should not, preclude approval of the revisions that have been made. *See* para. 9, nn. 31-32, *supra*.

[37] Several parties also express dissatisfaction with the impact analyses that NECA provided.

[38] *See* NECA Reply Comments at 24. The Commission can require the production of necessary data. *See* sections 1, 2, 4(i), 201-205 of the Communications Act, 47 U.S.C. §§ 151, 152, 154(i), 201-205 (1984).

and special access services be filed with the access tariffs that are scheduled to be filed by NECA in October 1986.[39]

11. Third, AT&T complains that the NECA proposal contains an unjustified $15.6 million increment in the first year that is attributable to "transition payments to companies that would experience decreases under the new schedules."[40] In response, NECA notes that the total increase (*i.e.*, the first year transition payment of $15.6 million and the annual increase of $21.6 million) is less than the increase that would otherwise occur under the present "message-driven" methodology.[41] Thus, Commission adoption of the proposed changes to the average schedules will be more consistent with our longer term objectives of less distortive, cost-based pricing. In this regard, we would observe that the $15.6 million is a non-recurring expenditure[42] that should facilitate the implementation of the new average schedules by providing a transition for companies that are affected by those changes. Among other things, this transition should permit these companies to conduct the analyses necessary to determine whether to continue in average schedule status. The transition should also reduce any indirect impact that a change in average schedule payments might have upon local service rates of affected companies.

12. Fourth, ICORE contends that the transition that has been proposed by NECA is too short and that inadequate notice of potential reductions in revenues to average schedule companies has been provided.[43] ICORE further argues that a longer transi-

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[39] Under this time table, average schedule companies will be able during 1986 and 1987 to assess fully the revisions that will have been made, and determine whether they prefer to be compensated wholly on a cost company, or wholly on an averge schedule settlements, basis. We will thus defer, until January 1, 1988, those provisions of our rules that require affiliated exchange carriers to settle either on a cost basis, or on an average schedule basis, and those provisions that require each exchange carrier to settle wholly on either a cost or average schedule basis. *See* paras. 13-16, *infra*.

[40] AT&T Comments at 1-2.

[41] NECA Reply Comments at 7, n.9.

[42] In each of the three subsequent years, the transition amount declines monotonically. *See* NECA Modification of Average Schedules at 20.

[43] ICORE Comments at 5-12; ICORE Reply Comments at 3-4, 12-15, 22-24. NECA noted in its Reply Comments that "[t]his transition is totally independent of the FCC-mandated transition commencing January 1, 1986 from the frozen interstate SPF to the 25 percent gross allocator. The new schedules were calculated using the composite SPF of the 255 look-alike cost companies before the SPF phase-down commenced. As NECA updates the costs supporting new average schedules in the future, those NTS costs will reflect the eight-year transition to the gross allocator. Therefore, the transition of the average schedule companies to 25 percent SPF is occurring on the same schedule as the cost companies and is not shortened by NECA's proposal." NECA Reply

tion period, possibly extending as long as twelve years,[44] would be more appropriate. We reject ICORE's assertion that inadequate notice has been provided. We issued the rules that govern the revisions to the average schedules on February 28, 1983 in the *Access Charge Order*. Those rules were reaffirmed in the *First Reconsideration Order*, which was released on August 22, 1983. More than two years elapsed before NECA filed the most recent revisions on September 17, 1985. The transition period and average schedule revisions that are contained in the NECA proposal have been recommended by the entire Board of Directors of NECA.[45] These factors, in addition to the other considerations discussed herein, lead us to the conclusion that the notice period has been sufficient, and that the transition period is adequate.[46] Moreover, "flash-cutting" companies that are receiving 100% or more of their total (state plus interstate) NTS revenue requirement from the average schedules to 85% would not appear to be either "unjust" or "unreasonable."[47] We thus conclude, in light of all of the evidence in this proceeding, as well as the policies and rules that have been expressed in our access charge orders,[48] that the modifications that NECA has proposed are reasonable and are, therefore, approved. Moreover, we do not construe our access charge rules as precluding an average schedule company from electing to be treated thereafter as a cost company even if it is

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Comments at 21.

[44] ICORE Comments at 10–11; ICORE Reply Comments at 14. In this regard ICORE attempts to draw an analogy to the "phase down" in the subscriber plant factor ("SPF") to 25% that has been required for cost companies. *See generally* Amendment of Part 67 of the Commission's rules, 89 F.C.C. 2d 1 (1982); Decision and Order in CC Docket No. 8-286, 96 FCC 2d 781 (1984). ICORE's analogy, however, does not encompass the requirement in our rules that the average schedules "simulate the disbursements" that would be paid to a cost company. *See* section 69.606(a) of our rules, 47 C.F.R. § 69.606(a) (1984). Under section 69.606(a), the average schedules are required to be modified, automatically, to reflect that "phase down."

[45] All exchange carriers that receive interstate carrier common line revenues for exchange access services are members of NECA (This presently includes all exchange carriers.) *See* section 69.601(a) of our rules, 47 C.F.R. § 69.601(a) (1984). *See generally* section 69.602 of the Commission's rules and regulations 47 C.F.R. § 69.602 (1984).

[46] *See* NECA Modification to Average Schedules at 2 (filed September 17, 1985). In addition to the unanimous assessment of the NECA Board of Directors (which includes representatives of average schedule companies) that the transition is adequate, the comments of the Rural Telephone Coalition (representing over 800 small exchange carriers) and ALLTEL also support this assessment.

[47] According to NECA, six companies are receiving more than 100% of their total NTS revenue requirement from the interstate jurisdiction through average schedule settlements. NECA Reply Comments at 19.

[48] *See* para. 4, note 12, *supra*.

presently participating in all of the average schedules. Therefore, any company that is adversely affected by a change in average schedule formulas will always have the option to obtain its full interstate costs through cost formula distributions. No company has a legal or equitable right to obtain more than its full costs.

B. Sections 69.605(c)(1)-(2) of the Commission's Rules.

13. As discussed earlier,[49] on December 28, 1984, this Commission issued a Notice of Proposed Rulemaking that, *inter alia*, requested comments be deleted or modified.[50] Section 69.605(c)(1) requires that all affiliated exchange carriers settle either on a cost basis, or on an average schedule basis. Section 69.605(c)(2) requires each exchange carrier to settle for all access elements either on a cost basis or on an average schedule basis. It will facilitate our discussion to address this latter requirement first.

14. The section 69.605(c)(2) requirement was imposed to prevent exchange carriers from "shopping" for the most attractive rate treatment. As we stated in the *Notice*:

> Permiting local exchange carriers to elect average schedule treatment for some service functions and cost for others creates incentives that hold the prospect of inflating local exchange revenue requirements.
>
> Permitting carriers to elect average schedule treatment ("AST"), when AST results in returns that exceed costs, and costs when cost treatment yields returns that exceed AST, would tend to create a revenue requirement that would diverge from costs and be contrary to our broader objective of "deloading" interstate toll.[51]

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[49] *See* paras. 5-6, *supra*.

[50] *Notice* at paras. 8-10. Parties favoring the elimination of the rules noted that: it is wrong to assume that the resources of one affiliate are available to another; resources of affiliates that are available "are not free"; cost studies are burdensome to small exchange carriers; average schedule companies should be permitted to use cost studies for line haul functions; the line haul investment for a majority of REA-financed systems is disproportionately higher "than the remaining plant," which assertedly argues for eliminating the requirement that companies receiving compensation under the "A" and "B" schedules be required to settle under the "C" schedule as well. *See* Rural Electrification Administration Comments and the Comments of the Rural Telephone Coalition, *passim*. In this regard, the motion of the Rural Electrification Administration for acceptance of late filed comments is granted. Parties favoring retention of the requirements that are imposed under sections 69.605(c)(1)-(2) noted that the existing rules are sound in that they tend to prevent charges for interstate services from being artifically increased. As NYNEX stated: "[b]oth of the Commission's rules chill the incentive to inflate artificially the cost base upon which a company's interstate compensation is based." NYNEX Comments at 4. *See generally*, AT&T Comments at 10-14.

[51] *Notice* at para. 10. *Accord* AT&T Comments at 12 (filed April 12, 1985); NYNEX Comments at 14 (filed April 14, 1985).

However, since the average schedule for line haul (Schedule C) functions had not been comprehensively revised since 1957 and NECA was in the process of updating the line haul and special access portions of the average schedules, we waived the application of section 69.605(c)(2) until June 1, 1986.[52]

15. In light of the comments that we have received, and our decision to require NECA to file proposed average schedule revisions for special access and line haul functions in October 1986,[53] we see no reason to refrain from retaining section 69.605(c)(2) as an integral element of our access charge policies. However, in the interest of affording affected carriers sufficient time to review NECA line haul and special access proposals and determine whether cost study treatment is more appropriate, we will defer the application of that rule through December 31, 1987.[54]

16. Section 69.605(c)(1) was designed to address related concerns that arose in the context of affiliated exchange carriers. As AT&T noted:

> [t]his rule is designed to prevent a parent company from performing cost studies for its high cost subsidiaries while relying on average schedule costs for its low-cost subsidiaries, thus obtaining an overall return exceeding what it would have realized if it treated all of its subsidiaries' costs on the same basis.[55]

The Court of Appeals for the D.C. Circuit, however, expressed concern that we had not adequately taken into account the possibility that a small average schedule company that was affiliated with a small cost company might not have sufficient resources to perform jurisdictionally separated cost analyses for both companies.[56] The evidence submitted by the Rural Telephone Coalition suggests the presence of a potential burden of sufficient

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[52] Order Granting Waiver In the Matter of MTS and WATS Market Structure (CC Docket No. 78-72, Phase I), FCC 84-77 (released March 9, 1984). At that time, NECA anticipated that a two year period would be sufficient to permit revisions to the line haul and special access portions of the average schedules.

[53] *See* para. 10, *supra.*

[54] We believe that this approach is responsive to the concerns that were expressed by the Court of Appeals. *See NARUC* at 1129. The Court expressed particular concern with respect to abnormally high line haul costs and noted in this regard that it was possible that its concerns could be addressed through appropriate revisions to the line haul portions of the average schedules. *See id.* In this order, we are directing NECA to implement revisions that will address the court's concern. That is, NECA shall design its revised average schedules to take into account the fact that some average schedule companies have unusually high line haul costs.

[55] AT&T Comments at 12 (filed April 29, 1985).

[56] *NARUC* at 1128.

magnitude to warrant softening the application of that rule.[57] We have accordingly concluded that section 69.605(c)(1) should not apply to the smaller companies included in subset three under section 69.602(a) of our rules — that is, those affiliated exchange carriers that receive less than $40,000,000 in aggregate annual revenues.[58]

III. Ordering Clauses

17. ACCORDINGLY, IT IS ORDERED, Pursuant to the authority that is contained in sections 1, 201-205, and 211 of the Communications Act of 1934, that the revisions to the average schedules that have been proposed by the National Exchange Carrier Association ARE APPROVED.

18. IT IS FURTHER ORDERED, Pursuant to sections 1, and 201-205 of the Communications Act, that NECA shall file, on not less than ninety (90) days notice, proposed revisions to the schedule C and special access compensation formulas that are to have a scheduled effective date of January 1, 1987.

19. IT IS FURTHER ORDERED, Pursuant to sections 1, 201, 202, and 205 of the Communications Act, that section 69.605(c) is modified as set forth in the Appendix to this Order, effective December 31, 1987.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM TRICARICO, *Secretary*

APPENDIX

The amendments that follow are to be made to Volume 47 of the Code of Federal Regulations, Part 69.

***AUTHORITY*: The authority for the amendments to these rules is contained in sections 1, 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 201-205 (1984), and section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1984).**

Section 69.605(c)(1) of the Commission's rules, 47 C.F.R. § 69.605(c)(1) (1984), is amended to read as follows:

* * * * *

(1) After December 31, 1987, any company that directly or indirectly controls, is directly or indirectly controlled by, is under direct or indirect

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[57] RTC Comments at Attachment.

[58] *See* section 69.602 (a)(1)-(2) of the Commission's rules, 47 C.F.R. §§ 69.602(a)(1)-(2) (1984). We note that in response to the *Notice*, no subset two or subset one exchange carrier objected to the retention of these rules.

control with, or merges with a telephone company that did not participate in average schedule settlements on December 1, 1982, shall not be deemed to be an average schedule company except that this provision shall not apply to affiliated exchange carriers that collectively have less than forty million dollars in annual operating revenues.

* * * * *

Section 69.605(c)(2) of the Commission's rules, 47 C.F.R. § 69.605(c)(2) (1984), is amended to read as follows:

* * * * *

(2) Any company that does not join in association tariffs for all access elements shall not be deemed to be an average schedule company. That notwithstanding, average schedule companies may elect to settle on a cost basis for line haul and special access services through December 31, 1987, while retaining average schedule status for all other settlement purposes. However, such an election does not waive the requirement that each average schedule company receiving compensation under the average schedule join in all association tariffs.

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Comparative Criteria

Integration credit disallowed where application was a sham structured solely to receive comparative preference and where integration proposal was a variance from original application.
—*N.E.O. Broadcasting Company*
MM Docket No. 83-1180

FCC 86R-18

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
N.E.O. BROADCASTING COMPANY Geneva, Ohio	MM DOCKET NO. 83-1180 File No. BPH-811201AI
Donald E. Martin d/b/a RAY-MAR BROADCASTING COMPANY Geneva, Ohio	MM DOCKET NO. 83-1181 File No. BPH-820624BK
For Construction Permit for a New FM station	

Appearances

Harry G. Sells, on behalf of N.E.O. Broadcasting Company, and *Leonard S. Joyce*, on behalf of Donald E. Martin, d/b/a/ Ray-Mar Broadcasting Company.

DECISION

Adopted: March 28, 1986; Released: April 4, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS AND ESBENSEN.*

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* The Board now consists of four members, including Board Member BLUMENTHAL. Subsequent to March 3, 1986, oral arguments and Decisions

BOARD MEMBER ESBENSEN:

1. This proceeding involves the mutually-exclusive applications of N.E.O. Broadcasting (NEO) and Donald E. Martin, d/b/a Ray-Mar Broadcasting Company (Ray-Mar) for authority to construct a new Class A FM broadcast facility to operate on Channel 285A (104.9 MHz) at Geneva, Ohio. By Hearing Designation Order (HDO), released November 4, 1983 (MM-602, 48 Fed. Reg. 51851), the applications were set for hearing[1] on the standard comparative issue.[2]

2. In his Initial Decision (I.D.), FCC 85D-60, released September 30, 1985, Administrative Law Judge Byron E. Harrison (ALJ) ultimately found Ray-Mar to be "the clear winner" (I.D., Conclusions, para. 18) after concluding, *inter alia*, that NEO could not be awarded any credit under the integration criterion because of its principal's lack of *de facto* control and variant proposal to be General Manager of the facility. The ALJ also accorded a "substantial demerit" to NEO under the diversification criterion by virtue of its principal's interest in a nearby AM daytime-only facility. (I.D., Conclusions, para. 17.) This proceeding is now before the Review Board on exceptions filed by NEO. We have reviewed the I.D. in light of the exceptions filed by NEO, the reply briefs filed by both parties, and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law, except as modified herein, and affirm the ALJ's ultimate conclusion that the grant of Ray-Mar's application would best serve the public interest, convenience, and necessity.

3. *Integration of Ownership and Management: NEO.* NEO is an Ohio corporation, originally composed (at the time NEO filed its application) of Edna M. Smith, President, Director, and 55% shareholder; Donald D. Smith, Vice President, Treasurer, Director, and 45% shareholder; and Allen D. Smith, Vice President, Secretary, and Director. Donald and Edna are husband and wife and parents of Allen. On February 2, 1983, the day prior to the

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will be heard and rendered by a rotating panel of three Board Members.

[1] One other application, that of American Ethnic Voice of Northeast Ohio, Inc., was originally designated in the HDO. However, that application was dismissed with prejudice for failure to prosecute by Memorandum Opinion and Order, FCC 85M-1546, released April 11, 1985.

[2] The HDO also specified that the areas and populations which would receive FM service of 1 mV/m or greater intensity from each party's proposal, together with the availability of other primary aural services, would be considered under the standard comparative issue. At hearing, the parties stipulated no substantial differences existed, and, as a result, no evidence was adduced concerning this matter.

established "B cut-off" date, NEO amended its application, as a matter of right, to specify that Edna M. Smith had become the sole (100%) shareholder.[3]

4. NEO's original application also divulges that Clarence V. Bucaro would be full-time General Manager.[4] In its February 2, 1983 amendment, NEO apparently attempted to magnify Edna Smith's involvement with the proposed station, but fell short of declaring her to be General Manager.[5] NEO claims 100% ownership and management integration credit based upon Mrs. Smith's 100% stock ownership and proposal to be full-time General Manager. The ALJ concluded that NEO could not receive any integration credit since its ownership arrangement was, in essence, a sham, and that Mrs. Smith's testimony at hearing that she would serve as General Manager was at variance with NEO's proposal. I.D., Conclusions, paras. 7–8. NEO has excepted to these conclusions.

5. Where it has appeared that parties might seek to disingenuously manipulate their ownership structure so as to receive, for example, a special racial or sexual preference, the Commission has monished that it will be keen to avoid " 'sham' arrangements." *See generally*, *KIST Corp.*, 58 RR 2d 1483, 1485, n. 5 (citing *Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982)), *appeal pending sub nom. United American Telecasters, Inc.* v. FCC, Nos. 85–1663, *et al* (D.C. Cir. filed October 15, 1985). We concur with the ALJ that the record pellucidly reveals that Edna M. Smith is merely a figurehead and that her husband, Donald D. Smith, is the controlling principal and moving force behind NEO (I.D., Findings, para. 6). NEO's claim of 100% integration, on this basis alone, cannot be credited. The ALJ made extensive findings with respect to NEO and the record clearly supports these findings.[6]

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[3] NEO's amendment relating to stock ownership states the following:

> "Delete in Table I that Mr. Donald D. Smith owns 45% of the stock, of the applicant and insert that Mrs. Edna M. Smith owns 100% of the stock of the applicant."

[4] Bucaro, it turns out, is Vice President and General Manager of Chardon, Ohio, AM Station WBKC. WBKC is licensed to Dale Broadcasting Company (DBC). DBC is wholly-owned by Consolidated Investment Corporation (CIC). All of the stock of CIC is owned by Donald D. Smith (I.D., Findings, paras, 17–19). *See* para. 8, *infra*.

[5] The exact language of the amendment is as follows:

> "Insert in Section IV–A, page 5, paragraph 27 that Mrs. Edna M. Smith will devote full time and attention to the construction, operation and day-to-day affairs of the proposed station. She will also reside in Geneva."

[6] We need not reiterate these detailed findings herein (I.D., Findings, paras.

6. With respect to Mrs. Smith's proposed integration as General Manager, it is evident that no such proposal was made by NEO until exhibits were exchanged prior to hearing.[7] NEO Exhibit 1. Therefore, we concur with the ALJ that Mrs. Smith's testimony concerning her proposal to be General Manager is at variance with NEO's application proposal and was developed in an impermissible attempt to improve NEO's comparative position. Moreover, Mrs. Smith poignantly testified as to her perception of her proposed role at the station:

> ". . . . Well, I said I would like to run the office, do all the clerical work, secretary and bookkeeping because that's what I was qualified for. But I would hire somebody to run the place, to do the station format and any other selling outside that needs to be done." (Tr. 62)

Mrs. Smith's own testimony plainly confirms that her putative 100% control over NEO's proposed facility is nothing more than a distressing attempt to subvert the Commission's comparative

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6-16); however, we will summarize the more salient facts demonstrating the dominance of Donald D. Smith. Mrs. Smith testified that she had little or no involvement in the preparation of NEO's application, and that she relied solely on her husband, Donald D. Smith, who prepared virtually all of FCC Form 301 on behalf of NEO, for the accuracy of the information included therein (I.D., Findings, para. 9). Furthermore, Mrs. Smith demonstrated that she had done little, if anything, to assume responsibility as President, Director, and sole owner of NEO. That is, she knew little about NEO's finances (I.D., Findings, para. 8), and knew nothing about NEO's financial qualifications set forth in section III of its application (I.D., Findings, para. 10). In addition, Mrs. Smith knew nothing about the equipment proposal which had been sent to Mr. Bucaro at the behest of Mr. Smith. (I.D., Findings, para. 11.) She knew nothing about NEO's proposed programming, which had been prepared by her husband; the number of hours the proposed station would operate daily; nor NEO's staffing positions (I.D., Findings, paras. 11-14). Also, Mrs. Smith never had discussions with the proposed General Manager, Bucaro, or with anyone else, concerning possible future employment roles at the proposed station (I.D., Findings, para. 14). Thus, Mrs. Smith had little or no involvement in or understanding of her application or the proposals she made to the Commission. See para. 7, *infra.*

[7] NEO's original application unequivocally states (FCC Form 301, Part VI, para. 27) that:

> "Clarence Bucaro will act as the full-time General Manager of the station and will make all of the day-to-day programming decisions and other decisions relating to the operation of the station under the direction of Mrs. Smith."

Perhaps it was the intention of NEO to timely amend its application to propose Mrs. Smith as General Manager; however, the amendment filed by NEO on February 2, 1983, set forth *verbatim et literatim* at n. 5, *supra*, is patently devoid of any representation that Mrs. Smith intended to replace Mr. Bucaro as proposed General Manager. Mrs. Smith also testified that she had not, in fact, decided on what her position or title would be at the station as of the date of filing the amendment (Tr. 126). NEO persists in arguing, in essence, that Mrs. Smith always intended to be integrated full-time as General Manager; however, the record is otherwise, and NEO's Sophoclean approach will not suffice in the comparative hearing process.

processes and to thereby purloin a sexual and 100%-ownership preference for a spouse ill-hidden behind gossamer apron strings. It is more distressing that the available FM frequency at issue herein, which will provide the first local broadcast facility to the residents of Geneva, Ohio, has lain fallow for almost five years during the pendency of this protracted proceeding.

7. In sum, we fully concur with the ALJ that the evidence of record reveals that NEO has been structured in a manner designed to achieve a comparative advantage by the specification of Mrs. Edna Smith, rather than her husband, Donald D. Smith, as its sole shareholder.[8] The record establishes that it was Mr. Smith who controlled NEO's finances. It was Donald, not Edna, who established NEO's first bank account, who was the sole signatory on that account, and who, for the initial three-year period after NEO's application was filed, paid all the bills incurred by NEO. But for the execution of NEO's application, Mrs. Smith never undertook any formal action as a corporate officer, director, or shareholder. Mrs. Smith conceded that she had no input into the preparation of NEO's application and that it was her husband, Donald, who virtually prepared the entire document. Mr. Smith undertook the task, at his own initiative, without even discussing with his wife what was involved or needed. Donald Smith made all decisions with regard to the application and the corporate structure of NEO, and Mrs. Smith merely acquiesced in what he had done. Thus, NEO's assertion that Mrs. Smith will have exclusive authority to manage and control the operation of the station is simply not credible. NEO's application is a mere facade to obfuscate Donald Smith's *de facto* control. Therefore, we hold that the ALJ did not err in finding that Donald D. Smith is the controlling force behind NEO and discounting NEO's integration proposal accordingly. *See Louisiana Super Communications Limited Partnership*, 59 RR 2d 761 (Rev. Bd. 1985); *Utah Television Associates Limited Partnership*, 59 RR 2d 493 (Rev. Bd. 1985); *KIST Corp.*, 99 FCC 2d 173, 57 RR 2d 49 (Rev. Bd. 1984), *modified*, 58 RR 2d 1483 (1985); *Berryville Broadcasting Company*, 70 FCC 2d 1, 4-8, 44 RR 2d 1325, 1330-33 (Rev. Bd. 1978); *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419, 423-26, 39 RR 2d 1099, 1106-10 (Rev. Bd. 1977). Additionally, we hold

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[8] Of course, it is not improper for an applicant to structure its proposal in a manner which it believes will most likely prevail in a comparative proceeding, *providing* the proposal is *bona fide*. *KIST Corp.*, 58 RR 2d 1483, 1486 n. 9 (1985). However, NEO's application and subsequent actions and representations herein could well provide the bases for a best-selling primer on "how-not-to" prepare for a comparative proceeding.

that NEO is not entitled to any integration credit for Mrs. Smith's proposal to be General Manager because it is well-established that an applicant cannot improve its comparative posture at hearing by proffering evidence which varies from its application. *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 45 RR 2d 1 (Rev. Bd. 1979), *rev. den.*, FCC 79-397, released June 21, 1979; *Gainesville Media Inc.*, 72 FCC 2d 799, 43 RR 2d 604 (Rev. Bd. 1978), *rev. den.*, 72 FCC 2d 795 (1979); *Webster-Baker Broadcasting Co.*, 88 FCC 2d 944, 50 RR 2d 1142 (Rev. Bd. 1982). Finally, Mrs. Smith is not entitled to integration credit for her proposed participation at the station since her own testimony is a revealing indicant of her perception of her duties; that is, a distinctly non-managerial role in day-to-day operations. She had not even decided what her role would be at the proposed station as of the "B cut-off" date. *See* n. 7, *supra*. As we have observed repeatedly, "without management and policy functions an applicant's principals do not merit ownership integration credit." *Makai Broadcasting Inc.*, 58 RR 2d 1488, 1489 (Rev. Bd. 1985); *Apogee, Inc.*, 99 FCC 2d 979, 987, 57 RR 2d 1585, 1591 (Rev. Bd. 1985). In light of the foregoing, NEO is entitled to no integration credit whatsoever.[9]

8. *Diversification of Control: NEO.* The ALJ found that as of the "B cut-off" date in this proceeding, Mrs. Edna Smith was an officer and director of Dale Broadcasting Company (DBC), licensee of AM Station WBKC, Chardon, Ohio;[10] that DBC was wholly-owned by Consolidated Investment Corporation (CIC); that CIC's stock was 100% owned by Edna Smith's husband, Donald D. Smith; that Mrs. Smith was an officer of CIC; that Allen D. Smith, the son of Edna and Donald, was an officer and director of NEO and DBC; and that Donald D. Smith was an officer of CIC, and an officer and director of NEO. (I.D., Findings, paras. 17-18.) Thus, the ALJ concluded that NEO should be assessed a substantial diversification demerit for its attributable media interests, based upon these common corporate positions. It was

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[9] The hearing in this case preceded the developments in *Steele* v. *FCC*, No. 84-1176 (D.C. Cir. August 23, 1985 and October 31, 1985), which called into question the current validity and status of the Commission's female enhancement credit. *See Talleyrand Broadcasting*, 59 RR 2d 563, 567 (Rev. Bd. 1985). That NEO continues to rely heavily on the female status of Mrs. Smith is evident from its exceptions at pp. 9-10. Nevertheless, even if the "female enhancement" matter were settled, we concur with the ALJ that any claim by NEO for a preference because Mrs. Smith is a woman must fail in light of the fact that she is not in any real sense the applicant. I.D., n. 10.

[10] Chardon, Ohio is less than 25 miles on a direct line from Geneva, Ohio (I.D., conclusions, para. 2).

further concluded that even if the Smiths were not linked to WBKC and the proposed Geneva FM station through these common positions, a substantial demerit should be assessed under the Commission's spousal attribution doctrine because the Smiths are husband and wife. NEO has excepted to these findings and conclusions. We concur fully with the ALJ's findings, but modify his conclusions pertaining to the magnitude of the demerit assessed. Before turning to the weight of NEO's diversification demerit, however, certain preliminary factual matters raised by NEO will be addressed.[11]

9. NEO contends that Donald and Allen Smith were not officers or directors of NEO as of the "B cut-off" date, nor was Edna Smith an officer or director of DBC and/or CIC on the same date. The record evidence is otherwise. The amendment purporting to report the exit of Donald D. and Allen D. Smith is set forth herein at n. 3, *supra*. Obviously, there is no reference to Donald D. Smith relinquishing his office or directorship, and there is no reference to Allen D. Smith whatsoever.[12] NEO also argues that Mrs. Smith was not an officer or director of DBC. The record reveals that the original application of NEO specified Mrs. Smith as Secretary of CIC and at least five other wholly-owned subsidiaries of CIC, including DBC (FCC Form 301, Table II; Tr. 86), and that Mrs. Smith was an officer and director of DBC. (I.D., Findings, para. 17.) These facts remained unchanged and unamended through the "B cut-off" date.[13]

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[11] We have indulged NEO's filing of unauthorized "Reply Exceptions" (see n. 13, *infra*) and have fully considered the representations and arguments contained therein; however, we remind counsel that such a pleading may only be filed in response to exceptions, not to the reply brief of its opponent. *See* Section 1.277(c) of the Commission's Rules.

[12] It is notable that on November 21, 1983, *17 days after the HDO was released*, NEO filed a Motion for Leave to Amend and an amendment deleting "all reference" to Donald and Allen Smith as officers, directors or stockholders. The Motion stated that Mrs. Smith's "husband Mr. Donald D. Smith and her son Alden D. Smith [sic] who were formerly part of N.E.O. have withdrawn . . . as they serve no useful purpose in the applicant." NEO claimed it could not, and would not, seek any comparative advantage from this amendment. The ALJ granted the Motion and accepted the amendment in light of NEO's disclaimer. Order, FCC 83M-4537, released December 7, 1983.

[13] When confronted at hearing with the application of NEO and its amendment filed in February 1983, *supra*, Mrs. Smith admitted that these documents reflected the cross-interests enumerated herein. (Tr. 86-88). NEO did file a Limited Request to Reopen the Record on May 24, 1984, some twenty-two days after the record was initially closed in an unabashed attempt to have admitted into evidence an Ownership Report filed on behalf of DBC on *May 24, 1984*. This Report purports to disclose that as of *May 31, 1982*, Mrs. Smith had resigned as an officer and director of DBC. In a related pleading filed May 24, 1984, counsel for NEO/DBC attempted to explain away the *723-day* reporting

10. Turning to the pertinent diversification considerations, NEO will receive a comparative demerit under the Commission's spousal attribution policy, which requires fully crediting Mr. Smith's 100% ownership of WKBC to Mrs. Smith for diversification purposes. *Hugh McBeath*, 59 RR 2d 1159 (Rev. Bd. 1986); *Alexander S. Klein, Jr.*, 86 FCC 2d 423, 49 RR 2d 606 (1981). Indeed, NEO does not dispute the applicability of spousal attribution in its Exceptions, only the degree of demerit. NEO claims that the demerit should be "slight." Ray-Mar concurs with the ALJ's "substantial" demerit. We hold that NEO should receive a moderate demerit for the diversification impact of its proposal. As we have recently observed, "the Commission's uniform tendency in the last 10 years has been to reserve substantial diversification preferences for situations in which the other applicants have in-town media interests." *Omaha TV 15, Inc.*, 102 FCC 2d 875, 884–885 (Rev. Bd. 1985); *Focus Television Co.*, 98 FCC 2d 546, 553, 56 RR 2d 1335, 1340 (Rev. Bd. 1984); *Phoenix Media Corp.*, 56 RR 2d 1241 (Rev. Bd. 1984).[14]

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hiatus of this significant information by claiming that he "normally meets the filing requirements of minor changes in the Officers and Directors with the Ownership Report . . . that must accompany the renewal of license of a station." NEO Opposition to Limited Request to Reopen the Record, May 24, 1984, pg. 2. The ALJ properly refused to reopen the record and admit the belatedly-proferred information. Order, FCC 84M–2619, released June 11, 1984. However, since this offending Ownership Report has been trotted out again by counsel in NEO's unauthorized Reply Exceptions, we are constrained to observe that Section 1.65 of the Rules, extant in May 1982 and 1984, is alive and well today. In any event, it is also noteworthy that, especially in light of NEO's contentious and repetitious representations concerning Mrs. Smith's connections with DBC, the record remains unrebutted and unchallenged that she is a Vice President of the parent company of DBC, CIC. (Tr. 42.)

[14] On December 30, 1985, NEO untimely filed with us a Petition for Leave to Amend and related Amendment which discloses that DBC purchased WTIG, Massillon, Ohio (File No. BAL–850728FB) on October 16, 1985, and filed an application seeking authority to purchase WQLS, Painesville, Ohio (File No. BAL–851105EJ). The amendment also shows that DBC filed an application (File No. BAL–851112EK) to assign WBKC, Chardon, Ohio, to Kendee Broadcasting Company so as not to "violate the Commission's cross-ownership and duopoly rules . . . ." occasioned by the proposed purchase of WQLS. Kendee is owned by the daughter of Mr. and Mrs. Smith (Deanna D. Smith). Counsel represented that he would appropriately notify the Board when the assignments were consummated. We are not aware of any such notification, but officially notice the records of the Commission which indicate that the WQLS and WKBC applications were granted some three months ago (on December 31, 1985). These additional in-state broadcast interests support our view that the weight of the preference should be more than slight. *See Phoenix Media Corp., supra* (four in-state interests given moderate weight).

11. *Integration and diversification: Ray-Mar.* No exceptions were filed by any party with respect to Ray-Mar. We concur with the ALJ's findings and conclusions. The principal of Ray-Mar, Donald E. Martin, will be the sole owner-operator and General Manager of the proposed station and will direct its day-to-day operation. He will move to Geneva, Ohio, and devote full time to the operation of the facility. Ray-Mar has no interest in, or connection with, any radio, television, or cable television facility, or any other medium of mass communications. Therefore, Ray-Mar is entitled to a substantial comparative preference under the integration criterion (100% v. 0%), and, having no other media interests, Ray-Mar is entitled to a moderate preference under the diversification criterion.

12. *Final evaluation.* All exceptions having decisional significance have been considered by the Board. Based upon the substantial preference awarded Ray-Mar with respect to its integration proposal, and the moderate demerit assessed NEO under the diversification criterion, the result herein is not even close. We affirm the ALJ's determination that Ray-Mar is the significantly preferred applicant in this proceeding. We hold that a grant of Ray-Mar's application will better serve the public interest, convenience, and necessity.

13. ACCORDINGLY, IT IS ORDERED that the Petition for Leave to Amend filed by NEO on December 30, 1985, IS GRANTED, and the tendered amendment IS ACCEPTED; and,

14. IT IS FURTHER ORDERED, that the application of N.E.O. Broadcasting Company (File No. BPH-811201AI) IS DENIED, and the application of Donald E. Martin d/b/a Ray-Mar Broadcasting Company (File No. BPH-820624BK) for a construction permit for a new FM facility at Geneva, Ohio IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. ESBENSEN, *Member, Review Board*

FCC 85D-60

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
N.E.O. BROADCASTING COMPANY Geneva, Ohio	MM DOCKET NO. 83-1180 File No. BPH-811201AI
Donald E. Martin d/b/a RAY-MAR BROADCASTING COMPANY Geneva, Ohio	MM DOCKET NO. 83-1181 File No. BPH-820624BK
For Construction Permit for a New FM Station	

Appearances

Harry G. Sells on behalf of N.E.O. Broadcasting Company and *Leonard S. Joyce* on behalf of Ray-Mar Broadcasting Company.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

Issued: September 26, 1985; Released: September 30, 1985

Preliminary Statement

1. This proceeding involves the mutually-exclusive applications of N.E.O. Broadcasting Company (NEO) and Donald E. Martin, d/b/a Ray-Mar Broadcasting Company (Ray-Mar) for a construction permit for a new FM station to be operated on Channel 285A (104.9 MHz) in Geneva, Ohio.

2. These two applications were designated for hearing by the Chief, Audio Services Division, by *Hearing Designation Order* (*HDO*) released November 4, 1983 (MM-602, 48 Fed. Reg. 51851) on the following issues:

(a) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

(b) To determine, in light of the evidence adduced, pursuant to the foregoing issue, which of the applications should be granted, if any.

3. The *Hearing Designation Order* stated that the areas and populations which would receive FM service of 1 mV/m or greater intensity from each party's proposal, together with the availability of other primary aural services in such areas, would be considered under the standard comparative issues. However, at the hearing, the parties stipulated orally that no substantial differences exist in the areas and populations to be served by each applicant (Tr. 26-32). Therefore, no evidence has been submitted concerning this matter.

4. A prehearing conference was held in Washington, D.C. on January 18, 1984. Evidentiary sessions were held in Washington, D.C. on May 1 and 2, 1984. The record was originally closed on May 2, 1984. However, by *Memorandum Opinion and Order*, FCC 85M-475, released June 11, 1984, the record was reopened and the issues were enlarged against American Ethnic Voice of Northeast Ohio, Inc. (American Ethnic) released January 31, 1985. The American Ethnic application was dismissed with prejudice for failure to prosecute by *Memorandum Opinion and Order*, FCC 85M-1546,[1] released April 11, 1985. Proposed findings of fact and conclusions of law were filed by the applicants on July 9, 1984 and both applicants filed reply findings and conclusions on July 19, 1984.

Findings of Fact

The Applicants

NEO

The Corporation and its Principals

5. The evidence submitted by NEO as its written direct case states that Edna M. Smith is President, Director and 100% stockholder of NEO (NEO Exhibit 1, p. 2). Mrs. Smith presently lives in Euclid, Ohio[2] where she has spent most of her life. Mrs. Smith graduated from the Euclid Central Senior High School and

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[1] Accordingly, no facts or conclusions are reached on the American Ethnic application.

[2] NEO and Ray-Mar have stipulated that none of the principals of the two applicants presently reside within the 1 mV/m primary service contour of their respective proposals (Joint Stipulation 1).

attended Dyke Business College. She is presently a homemaker and a secretary (*Id.*, p. 1). In the past, Mrs. Smith has worked as a personal secretary in the research department of a major oil company in Cleveland, Ohio. Later, she worked as corporate secretary and Vice-president of Consolidated Investment Corporation. In these positions, she has kept the corporate records and been involved in interior restaurant design and public relations (*Id.*) In Euclid, Ohio, Mrs. Smith has served as President of a service organization of the YMCA, President of the Euclid Veterans Club Auxiliary and on several committees of the Junior Board of the Euclid General Hospital. Mrs. Smith has accumulated in excess of 4,000 hours of volunteer work at the hospital (*Id.*)

6. Although NEO's direct case states that Mrs. Smith is the sole stockholder of the company, the evidence established through Mrs. Smith's cross-examination must be considered to determine if she is merely a figurehead and that it is her husband, Donald Smith, not Edna Smith, who controls the corporation and is the "true" or *de facto* owner of NEO.[3]

7. Under cross-examination, Mrs. Smith admitted that she has paid nothing for her shares of stock (Tr. 175-176). Mrs. Smith is not even aware of any corporate documents, i.e., stock certificates or agreements, reflecting her ownership interest in NEO. The only reason Mrs. Smith knows that she owns the stock is because her husband has told her so (Tr. 130-132).

8. Furthermore, Mrs. Smith revealed that she has done little, if anything, to assume responsibility as President and Director of NEO. For example, when asked about the company's finances, Mrs. Smith testified that she was not even aware of a $50,000 bank account which her husband had established for NEO (Tr. 134-135). She was not aware that her husband had established the account as early as 1981 and that he was the only person who could draw on the account (Tr. 140-143). All Mrs. Smith knew was that, prior to January, 1984, it was her husband who paid all of NEO's bills (Tr. 133-136). It has only been since January, 1984, when another account was established for NEO, that Mrs.

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[3] In NEO's original application, Mr. Smith was listed as the 45% stockholder of NEO and Mrs. Smith was listed as the 55% stockholder (Tr. 90-91). By amendment dated February 3, 1983, Mr. Smith was deleted as a stockholder of NEO (Tr. 84). Mrs. Smith testified that it was her husband's idea to eliminate his ownership interest in NEO since his other interests precluded him from being in the application (Tr. 89). However, she gave no explanation as to how or why her husband's other interests precluded him from having an equity position in NEO (*Id.*)

Smith has paid for any of NEO's expenses (*Id.*)

9. Mrs. Smith also revealed that she had little, if any, involvement in the preparation of NEO's application. Although Mrs. Smith signed NEO's application,[4] she testified that she relied solely on her husband, who virtually prepared the entire form, for the accuracy of the information included therein (Tr. 113). For example, Mrs. Smith knew nothing about NEO's legal qualifications, as set forth in Section II of the application. She testified that her husband supplied the information for that section (Tr. 93-94).

10. Mrs. Smith also knew nothing about NEO's financial qualifications, as set forth in Section III of the application. Mrs. Smith did not know where the financial information came from, since her husband had not discussed it with her (Tr. 94). Moreover, Mrs. Smith knew nothing about the proposed operating expenses for the station which were set forth in an exhibit to the application. Mrs. Smith testified that the information for the exhibit was supplied by her husband and that she had never even looked at the exhibit before the date of the hearing (Tr. 109-110).

11. Mrs. Smith knew nothing about the equipment proposal for the Geneva station. When asked why the document had been sent to the manager of her husband's radio station, WBKC, in Chardon, Ohio, she testified that her husband had arranged for the proposal and that she had never even seen the document (Tr. 111-112).

12. Mrs. Smith did not know anything about NEO's proposed programming for the Geneva station (Tr. 95-100 and 112-113). She testified that her husband provided this information and had never discussed it with her. Furthermore, she had never even seen NEO's programming policy or its news proposals which her husband had prepared and which were submitted as exhibits to the application (*Id.*)

13. Mrs. Smith was also unaware of how many hours NEO intends to broadcast on a daily basis, or how many hours FM stations are even permitted to broadcast (Tr. 105-108). Moreover, she knew nothing about NEO's staffing proposal (Tr. 104-105). When asked about NEO's proposal of four employees, Mrs. Smith testified that she has made no attempt to determine whether an FM station could be operated by only four employees (Tr.

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[4] The fact that Edna Smith signed NEO's 1981 application can be readily determined by looking at the application (File No. BPH-811201AI) for construction permit for the new Geneva station on file at the Commission, and, thus, can be officially noted.

109-110). Nor did Mrs. Smith know whether NEO's application had ever been amended to change the original proposal (Tr. 108). Mrs. Smith testified that she would seek her husband's advice on staffing matters (Tr. 63-64).

14. Furthermore, Mrs. Smith had not discussed with anyone the specific staffing positions which had to be filled at the station (Tr. 105). She testified that she had not even discussed with Clarence V. Bucaro, the person specified in NEO's application as the proposed General Manager of its station, or with anyone else their possible future role at the station (Tr. 99 and 158-159).

15. Finally, under cross-examination, Mrs. Smith revealed that she had never discussed the application with NEO's communications attorney prior to its filing with the Commission (Tr. 118). In fact, Mrs. Smith never even conversed with NEO's attorney until the early part of 1983, nor had she met him face-to-face until the hearing date, both several years after NEO's application had been filed (*Id.* and Tr. 154-156). Likewise, Mrs. Smith never communicated with NEO's consulting engineer until almost two years after NEO's application was on file at the Commission (Tr. 159).

16. In addition, although NEO's direct case states that Mrs. Smith is the sole principal of NEO, the evidence established through Mrs. Smith's cross-examination reveals that, as of the "B" cut-off date in this proceeding, there were two other principals of NEO in addition to Mrs. Smith — namely, Donald Smith, Mrs. Smith's husband and Allen Smith, Mrs. Smith's son, both of whom were officers and directors of NEO on the "B" cut-off date (Tr. 81-89).

NEO — Media Interests

17. In its written direct case, NEO stated that Edna Smith does not own, or have any interest in, any broadcast, CATV or media facility. (NEO Exhibit 1, p. 2). However, under cross-examination, Mrs. Smith conceded that, at the time of the "B" cut-off date in this proceeding, she was an officer and director of Dale Broadcasting Company (DBC), licensee of Station WBKC(AM), in Chardon, Ohio[5] and that she was an officer of DBC's parent corporation as well (Tr. 43-45, 73-78 and 86-88). Chardon, Ohio is less than 25 miles on a direct line from Geneva, Ohio.[6] Mrs. Smith had assumed the position of director of DBC

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[5] Official notice is taken of the fact that Station WBKC, licensed to Dale Broadcasting Company, is authorized to operate on 1560 KHz, with one kilowatt of power, during daytime hours only, in Chardon, Ohio.

[6] Official notice taken of Rand McNally Road Atlas, 1983 Edition, page 75.

on September 29, 1979 and the position of secretary of the licensee on July 21, 1980 (American Ethnic Exhibit 7).[7]

18. Furthermore, under cross-examination, evidence was elicited concerning the media interests of the other principals of NEO. The testimony reflects that Donald Smith, an officer and director of NEO, at the time of the "B" cut-off date (Tr. 83–85), was also the sole stockholder of Consolidated Investment Corporation which, in turn, owns all of the stock of DBC (Tr. 43–45 and 76–77). The testimony also reflects that, as of the "B" cut-off date, Allen Smith, an officer and director of NEO (Tr. 83–55), was an officer and director of DBC (Tr. 73–78; American Ethnic Exhibit 7).

19. In addition, it was revealed under cross-examination that Clarence V. Bucaro, the proposed General Manager for NEO's station (Tr. 59–62), is Vice-President of DBC (American Ethnic Exhibit 7) and the manager of Station WBKC (Tr. 59–62). It was also revealed that NEO plans to rely on the staff and programming materials of the Chardon station in order "to insure effective public service operation" for its proposed Geneva station (Tr. 109–110).

Integration Proposal — NEO

20. In its direct case, NEO proposed Mrs. Smith as the General Manager of the Geneva station. Mrs. Smith proposed to devote full time and attention (at least 40 hours per week) to the construction and day-to-day operation of the Geneva station (NEO Exhibit 1). She also proposes to move to and become a resident of Geneva, Ohio (*Id.*)

21. However, this proposal is at variance with NEO's application. In 1981, in its original application, NEO proposed Clarence Bucaro, General Manager of Station WBKC, as the General Manager for the Geneva station (Tr. 59–61). NEO never amended its application to reflect Mrs. Smith's proposal to be the General Manager (Tr. 100–102).[8] In fact, when asked about this variance, Mrs. Smith was not even aware of the fact that NEO's application had never been so amended (*Id.*)

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[7] While American Ethnic's application has been dismissed, it did participate fully in this phase of the hearing.

[8] Mrs. Smith was not certain when she decided to be General Manager for the Geneva station (Tr. 124–125). Presumably, she had not decided on this position by February 3, 1983, the "B" cut-off date in this proceeding. The amendment to NEO's application filed by that date only stated that Mrs. Smith would be sole stockholder of NEO and would devote full time and attention to the proposed station and it did not amend NEO's original proposal that Clarence Bucaro would be the General Manager of NEO's station (Tr. 101).

The Ray-Mar Application

The Applicant

22. Donald E. Martin, d/b/a Ray-Mar Broadcasting Company, filed as an individual applicant for the Geneva station (Ray-Mar Exhibit 2). Mr. Martin was born in Zoar, Ohio and presently resides in Mentor, Ohio.[9] He graduated from Mineral City High School and, in 1941, from Kent State University with a Bachelor of Science Degree in Education. Mr. Martin obtained a Master's Degree from Kent State in 1961 (Ray-Mar Exhibit 1, p. 1; Tr. 189).

23. From 1941 to 1944, Mr. Martin was employed as a teacher in Creston, Ohio. Thereafter, he worked as a teacher and coach in Painesville, Ohio for three years; in Strasburg, Ohio for six years; in North Canton, Ohio for eight years and in Paulding, Ohio for one year. The remainder of time, Mr. Martin worked in Euclid, Ohio (Tr. 189).

24. Presently, Mr. Martin is not employed. He lives approximately 25 miles from Geneva, Ohio. Mr. Martin has never lived or worked in Geneva or been employed by a radio station (Tr. 191–193).

Media Interests — Ray-Mar

25. Mr. Martin has no ownership interest in, or connection with, any broadcast station or any other media of mass communications. Moreover, he has no ownership interest in, or connection with, any application for any broadcast station or any other media of mass communications other than his pending application for a new FM station in Geneva, Ohio (Ray-Mar Exhibit 3).

Integration Proposal — Ray-Mar

26. Mr. Martin will be the sole owner-operator of the proposed Geneva station. He will be the General Manager of the station and will direct the day-to-day operation. He will set station policies and supervise all department heads (Ray-Mar Exhibit 2).

27. Mr. Martin intends to sell his place of residence at Mentor and move to Geneva, Ohio upon a grant of his construction permit. Geneva will be his sole residence (*Id.*)

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[9] Mentor, Ohio is outside the 1 mV/m primary service contour of Ray-Mar's proposed station. See Footnote 2, *supra*.

28. Mr. Martin will devote his full time to the operation of the Geneva station. He will have no other employment. He will devote a minimum of 40 hours per week to the operation of the proposed station (*Id.*)

29. Mr. Martin claims civic participation credit for his past high school and teaching assignments. However, there is no evidence that Mr. Martin ever held such jobs in Geneva, or, within Ray-Mar's primary service area.

Conclusions of Law

Diversification

1. The traditional guidelines for selecting between mutually-exclusive applicants for broadcast licenses are set forth in *The Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (hereinafter *Policy Statements*). The leading comparative criteria set forth in the *Policy Statement* is diversification of control of the media of mass communications (*Id.* at 394). The Commission stated in the *Policy Statement* that other interests in mass communications media in the principal area proposed to be served by an applicant will be normally of the greatest significance (*Id.*) The greater an applicant's interest in the particular medium in question, the greater the preference which is granted to the competing applicant (*Id.* at p. 395).

Diversification — NEO

2. Edna M. Smith, sole stockholder of NEO, is an officer and director of Dale Broadcasting Company (DBC), licensee of AM Station WBKC in Chardon, Ohio which is less than 25 miles from Geneva, Ohio (Findings, paras. 5 and 17). In addition, both Donald and Allen Smith, who remained officers and directors of NEO as of the "B" cut-off date in this proceeding, are linked to the Chardon station (Findings, 18). Donald Smith is the sole stockholder of Consolidated Investment Corporation which, in turn, is the sole stockholder of DBC, and Allen Smith is an officer and director of DBC (*Id.*) For the media interests of its principals, NEO thus, warrants a substantial demerit.

3. Moreover, even if the Smiths were not linked to the two stations through their corporate positions, NEO should be assessed a substantial demerit under the diversification criterion since Edna Smith, the sole stockholder of NEO and Donald Smith, the sole stockholder of DBC (through its parent), are husband and wife (American Ethnic Exhibit 7). The Commission has taken into

account the media interests of spouses when determining the comparative diversity of applicants. For example, in *Angeles Broadcasting Network*, 56 RR 2d 149 (Rev. Bd. 1984), a comparative proceeding to select an interim operator for a television station in the San Bernardino, California area, one of the applicants was assessed a slight to moderate demerit under the diversification criterion by virtue of the fact that the wife of one of the principals of the applicant had interests in two radio stations — one in Colorado and the other in Arizona. The Review Board indicated that if the radio station in which the wife had an interest had been in California, the diversification demerit would have been substantial (*Id.* at p. 153).

4. Thus, in view of the fact that Donald Smith, who is an officer and director of NEO, as well as Edna Smith's husband, is a broadcaster in a town in Ohio which is less than 25 miles from Geneva, NEO should be assessed a substantial demerit under the diversification criterion.

Diversification — Ray-Mar

5. In contrast, Ray-Mar has no interest in, or connection with, any radio, television or cable television station, or in any other medium of mass communications (Findings, para. 25). Thus, under the diversification criterion, Ray-Mar is awarded a substantial preference.

Integration

6. The second most important comparative criterion specified in the *Policy Statement* is full-time participation in station operation by owners (*Policy Statement, supra*, at p. 395).

Integration — NEO

7. NEO cannot be awarded any integration credit for Mrs. Smith's proposal to be General Manager of the Geneva station. It is well-established that an applicant cannot improve its comparative position at hearing by proffering evidence which is at variance from its application. *Midwest Broadcasting Co.*, 70 FCC 2d 1489; 45 RR 2d 1, 6 (Rev. Bd. 1979); *Gainesville Media, Inc.*, 72 FCC 2d 799; 43 RR 2d 604, 610 (Rev. Bd. 1978), *rev. den*, 72 FCC 2d 795 (1979) and *Webster-Baker Broadcasting Co.*, 50 RR 2d 1142, 1146 (Rev. Bd. 1982). NEO's application clearly states that Clarence Bucaro would be employed as General Manager of the Geneva station (Findings, para. 21). NEO never filed an amend-

ment to its original application specifying that Mrs. Smith would serve as General Manager. Thus, it is clear that Mrs. Smith's testimony concerning her proposal to serve as General Manager is at variance from the proposal in NEO's application and was developed too late in the proceeding to improve NEO's comparative position.

8. Furthermore, NEO cannot receive integration credit for Mrs. Smith's participation at the station because, contrary to NEO's assertion that Mrs. Smith is 100% owner, it is clear from the record that she has not, and will not, even exercise control of the company (Findings, paras. 6 and 15).

9. In determining control, the Commission has historically looked at control of the applicant's finances since one of the most effective methods of control of any business is control of is finances. See *e.g., Heitmeyer* v. *Federal Communications Commission*, 95 F. 2d 91, 99 (D.C. Cir. 1937). For example, in *Henderson Broadcasting, Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977), the Presiding Judge refused to give integration credit to an applicant whose 100% voting stockholder proposed to work full-time at the station when the stockholder provided no financing for the station and was not able to draw on the company's bank account. Also, in *Berryville Broadcasting Company*, 70 FCC 2d 1 (Rev. Bd. 1978), the Review Board refused to award integration credit to an applicant for the participation of two partners who had not advanced funds to the applicant and who were not authorized to draw on the applicant's checking account.

10. In this case, the record is clear that it was Donald Smith, not Edna Smith, who has controlled NEO's finances. It was Donald, not Edna Smith, who established NEO's first bank account, who was the sole signatory on that account, and, who, for a three-year period after NEO's application was filed, paid all of NEO's bills (Findings, para. 8). It has only been for the last six months, since January, 1984, that Mrs. Smith has paid any of the expenses for NEO.

11. In addition to financial considerations, the Commission also looks at other practical indicia of control, such as the assertion of authority over the applicant through formal corporate activities taken by its officers and directors or through the development of, and participation in, the application process. In *Kist Corp.*, 99 FCC 2d 291, the Presiding Judge gave no integration credit to an applicant where, in addition to financial consideration, the applicant's purported 95% owner had not taken any formal action as corporate officer, director or stockholder. The Review Board

affirmed the Judge's decision in *Kist Corp.*, 99 FCC 2d 173 (1984).*

12. Here, except for the execution of NEO's application, there is no evidence that Mrs. Smith has ever taken any formal action as a corporate officer, director or stockholder of NEO. In fact, it is only because of what her husband has told her, that Mrs. Smith even knows she owns any of NEO's stock (Findings, para. 7).

13. Moreover, it was Donald, not Edna Smith, who was the motivating force behind NEO's application. Mrs. Smith conceded that she had no input into the preparation of the application and that it was her husband who virtually prepared the entire document (Findings, para. 9). It cannot even be argued from the evidence that Mrs. Smith delegated the task of applying for the station to her husband. What the record reflects is that Mr. Smith undertook this task, at his own initiative, without even discussing what was involved with his wife, that he made all decisions with regard to the application and the corporate structure, and that Mrs. Smith acquiesed in what he had done (Findings, paras. 9–15).

14. It is clear from the evidence of record that NEO has been structured in a manner designed to achieve comparative preference by specifying Edna Smith, rather than her husband, as its 100% stockholder. Such structuring would have been acceptable if Mrs. Smith's role with the corporation had conformed to the substance, and not merely the label, of the proposal. *Berryville Broadcasting Company, supra,* at p. 7. However, the record reflects that it was Donald, not Edna Smith, who had knowledge of and participated in the application process and who controlled the finances of the corporation. Thus, NEO's application should be deemed to be merely a facade to cover Donald Smith's *de facto* control over the corporation. Consequently, to allow NEO to claim 100% integration credit would "make a mockery of the underlying objective of the integration criterion". *Henderson Broadcasting Co., supra.* at p. 426.

Integration — Ray-Marp

15. Ray-Mar's integration proposal is enhanced by the fact that Donald Martin proposes to reside in Geneva if Ray-Mar's application is successful. However, Mr. Martin does not have any

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* Affirmed by Commission *Memorandum Opinion and Order* (FCC 85-512) released September 24, 1985.

broadcast experience, nor has he ever been involved in civic affairs for which credit can be given. Thus, the enhancement that he is entitled to for this proposed residence in Geneva is only slight.

Auxiliary Power

16. Neither applicant proposes auxiliary power.

Ultimate Conclusions of Law

17. Based upon the foregoing discussion, it is clear that NEO's application must be denied. NEO cannot be awarded any credit under the integration criterion because of Mrs. Smith's variant proposal to be General Manager and because of her lack of "*de facto*" control of NEO. Moreover, even if NEO were to receive integration credit, the applicant must still be accorded a substantial demerit under the diversification criterion by virtue of the Smith's interests in the nearby Chardon station.[10]

18. Ray-Mar is the clear winner. In contrast to NEO, Ray-Mar is entitled to full credit for integration which is slightly enhanced by Mr. Martin's proposed residence in Geneva, Ohio. Further, Ray-Mar has no other media interests.

19. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion the application of Ray-Mar IS GRANTED and the application of NEO IS DENIED.[11]

FEDERAL COMMUNICATIONS COMMISSION

BYRON E. HARRISON, *Administrative Law Judge*

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[10] Additionally, any claim by NEO for a merit preference because Mrs. Smith is a woman must fail in view of the conclusion herein that Mrs. Smith is not in any real sense the applicant.

[11] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to 47 CFR 1.276(d).

Comparative Hearing
Diligence Lack of
Disqualification Financial
FM Station, Authorization
Staff Adequacy

Review Board reverses *Supp. I.D.* and disqualifies winner below on staffing and financial issues. ALJ should have denied post-remand amendment to submit wholly new proposals; no staff for 168-hour operation had been proposed. Also, $101,000 no-strings "gift" from brother viewed as probable sham. Remaining FM application granted.

—Pepper Schultz

MM Docket No. 83-1206

FCC 86R-2

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
PEPPER SCHULTZ Sparks, Nevada	MM Docket No. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS, INC. Sparks, Nevada	MM Docket No. 83-1207 File No. BPH-820628AQ
For Construction Permit	

Appearances

Herbert D. Miller, Jr., on behalf of Pepper Schultz; and *David M. Hunsaker* and *Denise B. Moline*, on behalf of Comstock Broadcasters, Inc.

DECISION

Adopted: January 14, 1986; Released: January 24, 1986

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, BLUMENTHAL.

BOARD MEMBER BLUMENTHAL:

1. This proceeding involves the mutually exclusive applications of Pepper Schultz (Schultz) and Comstock Broadcasters, Inc. (Comstock) for authority to construct a new FM broadcast station to operate on Channel 221 at Sparks, Nevada.[1] By *Hearing Designation Order*, 48 Fed. Reg. 51858, published November 14, 1983, the applications were designated for consolidated hearing on the standard comparative issue, including a comparison of the applicants' respective coverage of areas and populations. In an *Initial Decision* (*I.D.*), FCC 84D-49, released July 30, 1984, presiding Administrative Law Judge (ALJ) James F. Tierney granted the Schultz application after concluding that "Schultz must prevail by his being accorded 100% full-time integration [credit] versus 51% for his opponent." *I.D.*, Concls., para. 30. After considering the parties' exceptions to the *I.D.* and oral argument held before the Review Board on December 12, 1984, we remanded the proceeding to the ALJ on issues:

> (1) To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and
>
> (2) To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months operation.

Memorandum Opinion and Order, FCC 85R-5, released January 28, 1985 (Rev. Bd.) (hereinafter *"Remand Order"*). In a *Supplemental Initial Decision* (*S.I.D.*), FCC 85D-43, released June 26, 1985, the ALJ resolved both of the remand issues favorably to, and reaffirmed the grant of the application of, Schultz.

2. The proceeding is now before the Review Board on exceptions to the *S.I.D.* filed by Comstock and Schultz's reply. The Board has reviewed the *S.I.D.* in light of the exceptions and briefs and our examination of the record.[2] In light of our review, we

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[1] A third competing application, that of Red Rock Broadcasting Corp., was previously dismissed by the ALJ at the applicant's request pursuant to a settlement agreement, *see Memorandum Opinion and Order*, FCC 84M-1615, released April 3, 1984, and therefore is not before us for consideration.

[2] We shall deny Comstock's request for oral argument because we believe that such argument would not materially aid in the resolution of this case. *See*

must reverse the ALJ's erroneous conclusion that Schultz is basically qualified to be a licensee, and we grant the Comstock application.

3. In its exceptions, Comstock does not take issue, in the main, with the *S.I.D.*'s basic factual findings,[3] but instead urges that "Schultz's revised staffing proposal remains inadequate to permit operation of the station on a reasonable basis," Comstock Br. at 11–15; that the ALJ "erred in concluding that Schultz was financially qualified," *id.* at 18–25; and that Schultz's comparative standing should be downgraded "as a result of [his] fluctuating position on staffing and integration," *id.* at 15–18.[4] Schultz supports the ALJ's conclusions that his amended staffing plan is capable of effectuation, Schultz Reply at 10–17, and that he is financially qualified, *id.* at 2–9.

4. *Staffing Issue.* When he filed his application on May 19, 1982, and until December 26, 1984, Schultz repeatedly insisted that he would operate the proposed station completely by himself during the intial three-month period. *S.I.D.*, para. 5; *I.D.*, Concls. para. 6. Schultz indicated that he would have no money for hiring employees for a period of several months "when the money started rolling in." *Remand Order* at n. 4; *see also id.* at n. 3 (quoting hearing transcript of Schultz testimony). He apparently had a hazy idea that, by using studio automation equipment and an automatic transmission system, he could somehow operate the station for several months as a total one-man show, *24 hours per day*, with no human assistance of any kind. *Id.*; Tr. 43–49, 220. That is, Schultz testified that he intended to personally operate the station, including the performance of all the necessary announcing, engineering, sales, news, programming, business functions, *etc.*, *I.D.*, Concls., para. 6, with *no* staff whatever. At oral argument held December 12, 1984, we made apparent our skepticism over Schultz's patently incredible staffing proposal. *See* Tr. of Oral Arg. at 119 *et seq.* Realizing, then, that a remand

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Section 1.277(c) of the Rules, 47 CFR § 1.277(c); *Van Buren Community Service,* 87 FCC 2d 1018, 1019 (Rev. Bd. 1981).

[3] Comstock does claim that the *S.I.D.* should have found Schultz's costs of station construction and initial operation to be higher. As will be seen *infra*, this exception is decisionally insignificant.

[4] Comstock also avers that the ALJ erred in denying its motion to enlarge issues to add false certification, real party in interest, misrepresentation, and lack of candor issues against Schultz. Comstock Br. at 4–10. In light of our ultimate conclusion herein, we do not reach this exception, but agree — for reasons stated *infra* — that Schultz's original "certification" of financial ability was hollow. Were he not otherwise found disqualified, a hearing on Schultz's candor would be obligatory.

on a staffing issue was legally unavoidable, Schultz hastily filed a motion for leave to amend his application to substitute an entirely new staffing proposal, therein specifying reliance "on an automated transmission system (ATS) and on help provided without charge by friends [six acquaintances] to permit his proposed station to operate twenty-four hours per day with no 'employees.' " *See Remand Order*, at n. 6. We there denied Schultz's motion because he wholly failed to demonstrate "good cause" for the amendment in accordance with the tenets of 47 CFR § 73.3522, *see id.*, and we remanded the case, *inter alia*, on a staffing issue because Schultz's operational plans in this regard were, on their face, incapable of effectuation. *Remand Order* at paras. 4-5 and n. 8 (*citing KOWL, Inc.*, 49 FCC 2d 962, 966 (Rev. Bd. 1974), and *Brookhaven Broadcasting Co., Inc.*, 50 FCC 2d 703, 708 (Rev. Bd. 1975)).[5] In remanding, we admonished that no new staffing proposals should be proffered; instead, the remand hearing was simply to provide Schultz with a due process opportunity to demonstrate, if possible, how his facially absurd proposal could be effectuated. *Id.*, at para. 5.

5. Nonetheless, on February 22, 1985, Schultz filed before the ALJ a motion for leave to amend to specify yet a third staffing proposal, upon which proposal he now seeks to rely. *See S.I.D.*, paras 9-10. The ALJ, without performing the necessary "good cause" analysis, granted this motion, *see id.*, para. 7, and the third staffing proposal is embodied as the new Schultz Exhibit 2. Schultz concedes, as it must, that its current staffing proposal is an entirely new proposal, and not simply a minor refinement of earlier plans:

> While I had originally intended to hire no employees during the initial period of operation, and to rely on help provided by friends at no charge, *I have changed my plans* and now intend to hire . . . employees.

Schultz Exh. 2 at 4 (emphasis added). We hold that the ALJ's unauthorized grant of Schultz's amendatory motion was reversible error.

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[5] In essence, those cases hold that we will not question an applicant's intended staffing unless effectuation is "inherently improbable." *See, e.g., Brookhaven Broadcasting*, 50 FCC 2d at 708. Schultz's staffing — or, rather, lack thereof — appeared not only "improbable," but *a priori* impossible. When confronted, at hearing, with Schultz's outlandish assertions, a staffing issue should have been added immediately; and — with due respect — the ALJ should not have remained passive in the face of Schultz's startling admissions. Furthermore, we all but ignore counsel's flummery suggesting that Schultz's insistence that he would utilize no "employees" did not necessarily negate a reliance on friends and volunteers. This *post-hoc* ratiocination is directly contradicted both literally and by general implication in Schultz's hearing testimony. *See Remand Order* at n. 3.

6. In general, the Commission demands that an applicant have its proposal in order at the time it files its application. Although it may amend prior to the specified cut-off date as a matter of right, so as to accomplish any last-minute adjustments or firming-up, all basic arrangements necessary to pursue the application should be completed before a full comparative hearing on any competing proposals is to commence. *See* 47 CFR § 73.3522; *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978) ("the application should be finalized in advance of the start of the actual hearing"); *Dutchess Communications Corp.*, 101 FCC 2d 243, 254-255 (Rev. Bd. 1985). Should an applicant seek subsequently to alter its proposal, it must satisfy a six-part "good cause" test so as not to delay the proceeding or prejudice competing applicants. *Dutchess Communications, supra*, 101 FCC 2d at 255. That is, it must demonstrate: (1) due diligence; (2) involuntariness; (3) no modification or addition of issues or parties needed; (4) no disruption to hearing or need for additional hearing; (5) no unfair prejudice to other parties; and (6) no competitive advantage gained. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970).

7. As we recently emphasized in *Dutchess Communications, supra*:

> In the case of changes in [an] application proposal which go to basic qualifying matters, the Commission has recently relaxed its 'good cause' standards, *Anax Broadcasting*, [87 FCC 2d 483 (1981)], but those seeking to avail themselves of the Commission's equity in this regard must make some showing of good faith on their part . . . . On the other hand, an applicant may not proceed . . . *without seriously confirming the rudimentary struts of its proposal*; and, in the manner of Dickens' Mr. Micawber, hope that 'something will turn up.'

101 FCC 2d at 255 (footnote omitted; emphasis added). With regard to the proposals intended in its application, an applicant must be "*ready, willing,* and *able*" to effectuate. *Id.*, at 254 (emphasis in original).

8. Here, it is evident that Schultz did not begin to meet the *Erwin O'Conner* "good cause" test for amending his application; and, therefore, the ALJ erred in accepting it. First, Schultz was far from diligent in developing a wholly new staffing proposal after completion of the entire comparative hearing, and even after release of the *I.D.* and after the Board's oral argument. That his amendatory motion was filed within 30 days of the release of our

Remand Order is insufficient to render a finding of due diligence, because his failure to timely finalize his application at the appropriate time, *see Belo Broadcasting, supra*, or, at least, to take reasonable, good faith steps to do so, obliterates any equities that could excuse his prolonged failure. *Compare Dutchess Communications, supra*, 101 FCC 2d at 249-252 (lack of timely, serious efforts to arrange bank financing demonstrated lack of due diligence and warranted rejection of amendment) *with Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489 (1981) (submission of financial amendment promptly after obtaining crucial bank letter and within a few days of the deadline for amendments as of right raised sufficient equities to warrant its acceptance). Second, the amendment was necessitated by Schultz's failure to consider seriously the need to employ a staff competent to operate a broadcast station. Most critically, Schultz's failure to take reasonable steps to timely develop a *bona fide* staffing proposal has grossly delayed this proceeding. As was made abundantly clear in *Adjudicatory Re-Regulation*, 58 FCC 2d 865, 871 (1976), the broadcast application process is not a "paint-by-numbers" exercise, in which applicants fill in their proposals, even as they proceed through comparative hearings — and beyond. Such a process is inconceivable, and Schultz's post-hearing dabbling with his application is the antithesis of the fair, orderly process established by the Commission. *Belo Broadcasting, supra.* Further, because he utterly failed to satisfy four of the six criteria of the Commission's test for "good cause", Schultz's 1985 motion for leave to amend should have been denied. Having filed his application in May, 1982, it should not have taken Schultz nearly 3 years to appreciate that a round-the-clock radio operation would need some minimum semblance of a staff. His insistence throughout the comparative hearing that he alone would perform all of the myriad functions of an ongoing broadcast station — with neither sleep nor surcease — constituted irrefragable evidence that Schultz was either distantly out of touch with reality or singularly qualified for the laurel of "FCC Fabulist of the Decade."[6]

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[6] Schultz's solo, 168 hour per week proposal is to be distinguished from that of the celebrated Simon Geller. Geller, though a one-man symphony, was on the air for only 40 hours a week during the 1972-75 renewal period, and later on a 72 hour per week basis. *Simon Geller*, 90 FCC 2d 284, 287 n. 2 (ALJ 1978) (subsequent history omitted). Geller claimed to have worked 85 hours a week at the station, *id.*, at 295, and his programming was almost exclusively recorded music. *Id.*, at 286. Geller, of course, did no public interest programming of any kind, thereby placing his very license at peril.

9. Therefore, the answer to the question of whether Schultz could effectuate his *record* staffing proposal is a foregone conclusion. We find nothing in the hearing record to refute our perception in the *Remand Order* that there was no likelihood of Schultz being able to effectuate his superhuman proposal. And, we find no basis in law (or equity) for accepting an amendment nearly three years after the filing of an application which — *for the first time* — recognizes that staff, *any* staff, would be a useful element in running a fulltime broadcast station. Schultz's record lack of a credible staffing plan renders him unqualified to be a licensee. *Cf. United Broadcasting Company (KBAY-FM)*, 93 FCC 2d 482, 511-515 (1983) (despite lack of some precision, staff of 4 paid full-time persons, *i.e.*, sales director, engineer, news director, and "access" director; and pledges of 143 hours from 13 volunteers, found adequate to meet staffing issue).

10. *Financial Issue.* This issue was concurrently added because we found that "Schultz's indication that he can hire no employees to help him operate the station until 'the money started rolling in' after several months ineluctably raise[d] the issue of whether he has the financial resources to qualify for licenseeship." *Remand Order* at para. 5. At the remand hearing, the ALJ permitted Schultz to amend to reliance on a $101,000 money market account deposit with First Federal Savings, Sparks, Nevada, to meet proposed costs of construction and initial operation of $74,302.26.[7] This $101,000 was an allegedly recent "gift" from his brother and sister-in-law, *S.I.D.*, para. 16, a post-application "certification" largesse we refuse to credit (even if Schultz's amended financial proposal were procedurally permissible). Of his estimated costs, $10,000 was allocated for the purchase of a used transmitter and associated equipment from Station KTDY(FM), Lafayette, Louisiana, *id.*, para. 17(a), which equipment Schultz claims to have a right of first refusal to obtain. *Id.* Schultz does not actually have a transmitter available at present and has no definite plan to obtain one. *Id.*

11. The Commission requires that radio station applicants have sufficient financial resources to meet their costs of construction and initial three-months operation. *See GACO Communications Corp.*, 94 FCC 2d 761, 781-782 and n. 72 (Rev. Bd. 1983), *aff'd as*

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[7] Schultz was also said to have available $3,500 in savings, and would receive a lump sum payment of $7,500 for his accrued retirement contributions when he resigns from his current employment with the Department of the Interior Bureau of Land Management. *S.I.D.*, para. 14. He also claimed approximately $300 in a credit union account. Tr. 201.

modified, FCC 84-212, released May 14, 1984 (Comm'n). Although Schultz "certified" with his application that he had the necessary financial resources, Schultz Application, filed May 19, 1982, FCC Form 301, Section III, it is clear that Schultz, at the time of certification, had made no serious arrangements whatever for the requisite funding. The best Schultz could assert was:

> It is true that Mr. Schultz did not personally own all of the resources needed to construct and operate his proposed station in 1982. However, he *believed* that he had ready access to all of those resources; as demonstrated by the ease with which he obtained the funds when it became appropriate to do so by virtue of the grant of his application in 1984, his expectation was entirely reasonable.
>
> * * *
>
> Mr. Schultz also *believed* that he would be able to obtain the necessary funds. As indicated in his attached statement, he had been in contact with financial institutions and equipment suppliers, by telephone and by mail; had discussed terms with them; and *believed that upon grant of his construction permit the necessary resources would be available.*

Schultz Opposition to Motion for Enlargement of Issues, filed April 18, 1985, at 2-3 (emphasis added). However, the Commission has made clear[8]:

> It is not sufficient for an applicant to simply *believe that it will be financially qualified by the time it obtains a construction permit.* Instead, as summarized in the current version of the FCC Form 301, an applicant must certify that it has sufficient net liquid assets on hand or available from *committed sources* to construct and operate the proposed station for three months without revenue. Moreover, if some or all of the financing is to be provided by others, *the applicant must have reasonable assurance of a present firm intention for each agreement to furnish financing.* The applicant must be able and willing to meet all contractual requirements with respect to collateral, guarantees, and capital investment, and the applicant must have determined that a reasonable assurance exists that all sources other than financial institutions, banks, and equipment manufacturers have sufficient net liquid assets to meet their commitments. *Revision of Form 301*, ... 50 Rad. Reg. 2d (P&F) [381,] 382, 397 [1981]. *See GACO Communications Corp.*, 94 FCC 2d 761, 775 (Rev. Bd. 1984), *review denied*, FCC 84-212, released May 15, 1984; *United Broadcasting Co. (KBAY-FM)*, 93 FCC 2d 808, 832 n. 101 (1983).

Schultz, of course, alleged no such firm arrangements with financiers.

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[8] *Dutchess Communications, supra*, 101 FCC 2d at 246 n. 4 (*quoting* Brief of FCC in *James L. Oyster* v. *FCC*, No. 84-1562 (D.C. Cir. 1984), at 3-4 (footnote omitted; emphasis added).

12. At the remand, the ALJ found that Schultz claimed to be relying on two sources of funds (*other than* a purported $101,000 "gift" from his brother and sister-in-law which, *inter alia*, was interposed too late in the proceeding to receive legal cognizance). They were: (1) $3,500 in two bank accounts; and (2) a distribution of retirement earnings in the amount of $7,500 expected upon resignation of Schultz's U.S. Government job. *S.I.D.* at para. 24. Plainly, these two sources were not sufficient to meet his proposed costs of $74,302.26. However, after oral argument and the Board's addition of the issue to determine whether he had sufficient funds to cover his costs of construction and initial operation, *Remand Order* at para. 8(2), Schultz sought leave to amend his application to show that he now had "savings on deposit with First Federal Savings of Nevada in excess of $101,000.00 cash subject to withdrawal at any time." Schultz Motion for Leave to Amend, filed February 22, 1985, Att. F. This post-hearing amendment was thoroughly unacceptable, for while we give equitable leeway to those seeking to overcome basic disqualifying issues, *Anax Broadcasting, supra*, 87 FCC 2d at 489, there must be made a showing of timely good faith. *Dutchess Communications, supra*, 101 FCC 2d at 255. Here, no "good cause" whatever was shown for this particular "after-the-ball-was-over" amendment.

13. Even so, as to the alleged $101,000 "gift," we agree with Comstock that a "dark shadow of doubt" surrounds the *bona fides* of the intrafamilial transfer of funds. *See S.I.D.*, para. 25. The $101,000 was first asserted in Schultz's February 22, 1985 motion for leave to amend as funds available to him and withdrawable by him at any time. However, in undisputed testimony elicited at a deposition session held March 15, 1985, Comstock Opposition to Motion for Summary Decision, filed April 2, 1985, Exh. B (hereinafter "Dep. at ——"); *see also* Schultz Reply at 21–22 (quoting Schultz testimony at deposition), it was revealed by Comstock that Schultz had merely been made a co-signatory on a savings account owned jointly by his brother, the brother's wife, and another family friend. Dep. at 33–34. This maneuver was made only after Schultz asked his brother to guarantee a bank loan he intended to apply for, *id.*, at 42–44, an arrangement apparently unacceptable to the brother. The $101,000 represented solely the savings of Schultz's brother and his brother's wife, *id.*, at 36–37, and it is freely conceded that Schultz's name was placed on the account "to qualify [him] to get . . . a permit and get it on the air." *Id.* at 35. Subsequently, in

opposing Comstock's April 5, 1985 motion to enlarge issues which sought the addition of false financial certification, financial misrepresentation, real party-in-interest, and lack of candor issues against Schultz, Schultz supplied an April 12, 1985 affidavit from his brother stating that:

> In mid March, Pepper advised me that his attorney had advised him that the Commission might have some concern over the bona fides of the gift, in view of the joint nature of the account. Since it was my view that the money was Pepper's to do with as he pleased, I had no objection whatever to withdrawal of the funds or to the opening of a new account in Pepper's name alone. I cooperated with him to this end.
>
> I have no desire for any financial or other interest in Pepper's proposed station, and there is no understanding between us that I or anyone else will be given any such interest. Nor do we have any agreement or understanding concerning "repayment" of the gift. It is a gift, not a loan.

Schultz Opposition to Motion for Enlargement of Issues, filed April 18, 1985 at Attachment B. However, Schultz and his brother never discussed the considerable federal gift tax ramifications of the purported gift, Tr. 212; Schultz absently suggested that, if a gift tax were imposed, he would pay it because "I wouldn't expect him to pay anything on it." Tr. 213. In short, we view this last-minute, hastily arranged "gift" of $101,000 as a very possible sham. More, indeed, would be necessary to substantiate the remarkable claim that, without promise of repayment or an equity interest in the station, Schultz's brother and sister-in-law casually signed over to him what appears to be their life's savings, for it is not unknown for a sibling to pop in at the last moment with a belated transfer of valuable assets in an attempt to shore up a troubled financial proposal. *Cf. WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132, 1138-1144 (D.C. Cir. 1985).[9]

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[9] Other circumstances surrounding this curious "gift" further lessen our confidence in its credibility. Thus, despite our admonition that a party claiming an asset should reveal whether the legal ownership is qualified, *WHW Enterprises, Inc.*, 89 FCC 2d 799, 807-808 (Rev. Bd. 1982), Schultz's February 22, 1985 amendment (George Washington's Birthday, no less) indicating funds on deposit of $101,000 contained no such qualification. It remained for Comstock to learn, at later deposition, that — lo and behold — the $101,000 actually belonged to his brother and sister-in-law (and a third party), Schultz merely being made a co-signatory to the account to permit him to claim the funds as available for station financing. Comstock Br. at 6. Only *after* Comstock's discovery of this cozy arrangement were the monies transferred to an account in Schultz's name. *See id.*

Raising additional doubt is the amazing fact that, despite the claims of a "no strings attached" conveyance of $101,000, Schultz testified at subsequent hearing that he might not draw upon this windfall for financing the station, but might instead use it solely as "collateral" for a cash bank loan. Tr. 237-239.

14. *Schultz's Exceptions.* We have also considered Schultz's exceptions to the original *I.D.* and, in light of our disqualification of Schultz, do not reach those which pertain exclusively to the comparative issue. *See* Schultz Contingent Exceptions at 12 *et seq*. The remaining exception that the ALJ erroneously permitted Comstock to change its transmitter site before hearing, *see id.* at 7–11; *Memorandum Opinion and Order*, FCC 84M-2280, released May 15, 1984, we must deny. The record shows that Schultz had filed a pre-hearing petition to dismiss, which petition claimed that Comstock's site would be a substantial hazard to air navigation. Comstock promptly consulted with its legal and engineering consultants who, in turn, conferred with appropriate FAA Western Regional Office personnel. Comstock Reply at 6–7. Applying FAA technical criteria, Comstock's consultants found errors in the FAA letter to Schultz concerning Comstock's site and they calculated that there was no air hazard problem with its site which, in fact, was an existing radio tower formerly used by a station operating at higher power and frequency levels. *Id.* at 6. On February 3, 1984, an FAA Western Regional official sent a letter to the presiding ALJ — but *not* to Comstock — indicating problems with Comstock's site. After considering whether to prosecute an appeal with the Washington Office of the FAA, and deciding not to, Comstock filed a transmitter site amendment on March 23, 1984, four days *before* the hearing commenced. We affirm the ALJ's ruling that Comstock has demonstrated "good cause" for its amendment. Comstock was diligent in undertaking to resolve the issue with the FAA and, when it could not, in amending to specify an unobjectionable site. For this reason, *Outer Banks Radio Co.*, 13 FCC 2d 385 (Rev. Bd. 1968), and *Shoblom Broadcasting, Inc.*, 53 RR 2d 1203 (Rev. Bd. 1983) (subsequent history omitted), relied upon by Schultz, are readily distinguishable. The site amendment was not voluntary, nor did it delay the proceedings, nor did it prejudice Schultz.

Just why Schultz might offer the bank his freefound $101,000 ready cash for a lesser cash loan is unexplained, but we are certain that the hard-pressed banking industry would gladly rather receive tribute than pay it. We'd take the deal ourselves.

Hence, even were Schultz's February 1985 financial amendment procedurally permissible and cognizable, it could lead to no more than a lack of candor issue to test the *bona fides* of this convenient bonanza.

Conclusions

15. This case, while perhaps a fluke, does nevertheless illuminate the downside risks of a much simplified application process, through which channels occasionally slip those without the barest ability to construct and operate a full power broadcast station, let alone possessing the considerable resources requisite to serving the American public in the manner to which it has become accustomed. *See, e.g., Dutchess Communications, supra; GACO Communications Corp., supra.* While we have not previously encountered so threadbare an applicant as Schultz, we do reiterate our concern that more attention be given to an applicant's basic qualifications at the front end of the application process, so as to avoid the elaborate farce reflected in these extended proceedings.[10] We would hope that notice of these matters will be taken in sisterly quarters, with an eye toward a more active scrutiny at the earliest application review stage.[11]

16. But for the unnecessary time and appreciable public expense caused by Schultz's arid application, this case is not entirely without a strain of mellowing pathos. Pepper Schultz, a humble employee of the Department of Interior's Bureau of Land Management, with $3,500 in personal savings and a meager $7,500 in his federal retirement account, *S.I.D.*, para. 14,[12] ventured to Washington with the proposal to build and operate — all by himself — a full service Nevada radio station. Schultz's plan (and lack of supporting resources) called for him to operate, on a 24 hour per day schedule, unassisted for the first several months, his individual chores to include *all* of the programming, sales, bookkeeping, engineering, FCC recordkeeping, *etc. S.I.D.*, para. 5. Apparently accepting the patent impossibility of his notions only *after* oral argument on the exceptions to the hearing *I.D.*, Schultz

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[10] Again, as indicated, some of the fault for the unnecessary prolongation of this case must be placed on the presiding ALJ, a decent man whose well-known patience and mercy were here taken advantage of by an applicant more to be pitied than pampered. A swift disqualification of Schultz at the initial hearing stage was provided by law; the temporization caused only waste, delay and injustice to the qualified competing applicant and — more importantly — to the public.

[11] The application processing staff might have noted that a financial issue had been added against Schultz in a broadcast application proceeding *just prior* to Schultz's 1982 "certification" of financial ability in this proceeding. *See* FCC 81D-10, released March 11, 1981, BC Docket 79-174. It also might have noticed that, apparently, Schultz's application itself indicated that Schultz "would employ 0 employees." Tr. at 49.

[12] These assets must be offset by his (then) current legal tab of $20,000, *S.I.D.*, para. 15, a deficit he was said to be retiring at $600 per quarter.

filed on December 26, 1984 an amendment proposing to use automated transmitting equipment, as if that minor measure would overcome the transpicuous hopelessness of the balance of his proposal. As to that sorely belated amendment, the ALJ reports:

> When Schultz was thinking of using automated equipment, he was relying on information gained through correspondence courses on computers to decide what kind of equipment to buy to run the station as far as billing, selecting proper tape machines, commercials and transmitter parameters. He was not going to write his own programs or build his own equipment.

S.I.D., para. 5.[13] Even now, Schultz urges that he be permitted a construction permit to operate with not much more in the way of resources than might be required for, say, a modest roadside fruitstand, and in an environment that would have daunted and depressed the desperate denizens of Devil's Island.[14]

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[13] In any event, Schultz has apparently now abandoned the uneducated illusion that ATS equipment was the panacea. It is not known whether Schultz completed his computer "correspondence courses," or whether he had merely advanced sufficiently to realize that neither R2-D2 nor C3-PO was a "stock" equipment item.

[14] We need not detail all of the deficiencies of Schultz's *amended* proposal, for they are amply described in the *S.I.D.* Suffice it for our's and the reader's purposes to note:

> Schultz's staff will be required to work in a studio space of [3]00 square feet, which will accommodate a studio control room, Schultz's office, the bookkeeper/traffic person's office and a production room. (Tr. 188). Schultz does not intend to provide air conditioning in an area where the temperature sometimes climbs to as high as 101° - 102°. (Tr. 190). He does not intend to hire any sales staff or news personnel. *Id.* Schultz proposes to do all of the sales for the station himself. (Tr. 195-96).
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> * * *
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> Schultz would not produce his own commercials. (Tr. 204). He proposes to sell an advertising contract to an advertiser, and then direct the advertiser to one or more local advertising agencies which have facilities to make commercials. The agency would write the copy and produce the commercial, charging the advertiser a fee for the service. (Tr. 204-205). Schultz did not know, and has not asked any agencies what they would charge the advertiser for the writing and production service. (Tr. 206). He has inquired of several agencies whether they have production facilities available (Tr. 205), and has asked agency personnel to "get their tape recorders ready." (Tr. 206). Schultz would ask that the commercials be produced on a tape cassette, if the agency can do it (Tr. 208), as he does not have on hand, and does not plan to purchase initially any cartridge or "cart" record/playback.

S.I.D., at paras. 10-11. It goes on, and it is sad to further note that this proposal comes from a man who *did* once receive a broadcasting construction permit, but was compelled to turn it back to the Commission. The reason for Schultz's failure to effectuate the prior permit is reflected below:

MR. BLUMENTHAL: He wasn't sleeping up at Sparks?

17. We do not know if Schultz was (or is) serious about his proposal, is incurably deluded, or merely covets the permit in the hope of quick enrichment. Schultz's staffing and financial proposals of legal record are untenable. And, as to his impermissible post-hearing amendments:

> We cannot allow the [applicant] to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

Colorado Radio Corp. v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941). Even in this age of reduced burdens of licenseeship, *see Deregulation of Radio*, 84 FCC 2d 968 (1981) (subsequent history omitted), Schultz has been painfully exposed as far unequal to that public burden. That it has taken from mid-1982 to reach this inevitable conclusion is an unfortunate comment on the administration of *our own* public burdens.

18. ACCORDINGLY, IT IS ORDERED, That the request for oral argument filed September 3, 1985 by Comstock Broadcasters, Inc. IS DENIED; and

19. IT IS FURTHER ORDERED, That the application of Comstock Broadcasters, Inc. (File No. BPH-820628AQ) for authority to establish a new FM broadcast station at Sparks, Nevada IS GRANTED, and that the application of Pepper Schultz (File No. BPH-820519AK) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

NORMAN B. BLUMENTHAL, *Member, Review Board*

SCHULTZ COUNSEL: No. No. He was under pressure. He was hospitalized with a nervous breakdown.

CHAIRMAN MARINO: Well, that's what I'm asking about.

SCHULTZ COUNSEL: Well, that's not on the record.

* * *

MR. BLUMENTHAL: This is a man who, 15 years ago was hospitalized with a nervous breakdown, and here proposes to be the sole employee, to do everything from — all the announcing, sale of all the commercials, do all of the engineering, billing, and so forth, until such time as he had a cash flow sufficient to hire personnel. This is the —

SCHULTZ COUNSEL: For a brief period, that is his stated intention.

Tr. of Oral Arg. at 130.

FCC 85D-43

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

PEPPER SCHULTZ Sparks, Nevada	MM Docket No. 83-1206 File No. BPH-820519AK
COMSTOCK BROADCASTERS, INC. Sparks, Nevada	MM Docket No. 83-1207 File No. BPH-820628AQ
For Construction Permit	

Appearances

Herbert D. Miller, Jr., Esq. (Koteen and Naftalin) on behalf of Pepper Schultz; David M. Hunsaker (Putbrese and Hunsaker) on behalf of Comstock Broadcasters, Inc.; and Norman Goldstein, Esq. on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION OF DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE JAMES F. TIERNEY

Issued: June 21, 1985; Released: June 26, 1985

Preliminary Statement

1. By *Memorandum Opinion and Order*, FCC 85R-5, released January 28, 1985, the Review Board remanded this proceeding and added the following issues:

a. To determine whether the staff proposed by Pepper Schultz is adequate to effectuate his proposal; and

b. To determine whether Pepper Schultz has sufficient funds to cover his costs of construction and initial three months operation.

2. A further prehearing conference was held on February 2, 1985 principally setting dates for the hearing of the added issues. On May 19, 1985, Pepper Schultz (Schultz) filed a Motion for Summary Decision which was later denied by *Order*, FCC 85M-1599, released April 12, 1985. The hearing was held on April 9, 1985 and the record was closed on that date. Proposed Findings of Fact and Conclusions of Law were filed, as directed, by the parties applicant on June 3, 1985; Reply Findings were filed on June 14, 1985.

3. Where factual proposals of the parties faithfully reflect the evidence of record, they not only serve the efficient expedition of the administration of justice, they are welcome augurs to the customary burdens of the trier-of-fact, hence, effectively serve the principal objects of the governing Rule — Rule 1.263 (47 CFR 1.263). Here, the parties have, in the main, honored those notions and liberal use and adoption of the proposals most fine-tuned have been made and adopted, save at times, for preference of language, largely editorial in nature. Proposed conclusions are usually another matter where the poetic license of advocacy permits greater let in the strivings for truth.

4. For the reasons set forth hereinafter, this, as a Supplemental Initial Decision SHALL GRANT the application of Pepper Schultz; that being so, the application Comstock Broadcasters, Inc. MUST BE DENIED.

Findings of Fact

I. Staffing Issue.

5. Schultz, at the time of filing his original application, and until December 12, 1984, intended to operate his proposed station completely by himself, at least initially, by the use of studio automation equipment and an ATS (automatic transmission system). (Tr. 220, 221-222). He did not intend then to use any personnel, hired employees or volunteer help. (*Id.*, p. 220). When Schultz was thinking of using automated equipment, he was relying on information gained through correspondence courses on computers to decide what kind of equipment to buy to run the station as far as billing, selecting proper tape machines, commercials and transmitter parameters. He was not going to write his own programs or build his own equipment. (Tr. 239).

6. Schultz's intention to automate and use no personnel changed after oral argument before the Review Board in December, perhaps due to remarks that remand on a staffing issue was

a possibility. (Tr. 221). Prior to the issuance of the remand *Order* Schultz sought to amend his application to preempt such remand possibility:

> So I amend [made] an amendment at that time, or a brief, to try to get out from having the remand process. So I took an avenue, and I went to some of my friends to get them, I asked them if they would help me out, and they said they would, on staffing of the station. So I was just trying to correct a possible deficiency, which I didn't know if it would come true or not at the time. (Tr. 221–222).

7. Schultz then proffered an amendment to the Review Board (filed on December 26, 1984) indicating that (a) he might not operate 24 hours per day initially as he had previously testified, and (b) he now intended to rely on the volunteer help of six acquaintances.[1] (*Id*). This amendment was rejected by the Review Board in its Remand *Order* for failure to make a sufficient good cause showing. FCC 85R-5, p. 4, n. 6; (Tr. 223–224). Thereafter, on February 22, 1985, Schultz petitioned to amend his application, proposing to hire four full-time and six part-time employees. It is on this latest amendment, that Schultz relies to meet the staffing issue added by the Board. (Tr. 223–224).

8. While he has now abandoned the idea of using automation equipment and an ATS system, he may decide to use such a system after the station is operational. (Tr. 225). While he had no timetable for changeover, he indicated that such a move would likely be made after the station is making a profit. (Tr. 226). Alternatively, he stated that he might invest in new equipment for the station. (Tr. 226).

9. According to Schultz's Exhibit No. 2, the proposed staff will have the following duties:

> The three full time announcers will take care of announcing and will also perform required equipment monitoring functions Mondays through Fridays in eight hour shifts. One announcer will perform the same duties on weekends, in three eight hour shifts on Saturdays and in three eight hour shifts on Sundays. I will fill in as necessary. In addition to such announcing duties as it may be necessary for me to perform, and in addition to my responsibilities as owner and General Manager, I am qualified to and will perform the duties of Chief Engineer. I will also devote approximately twenty hours per week to selling time on the station. All employees will, of course, perform their duties under my supervision and subject to my direction. (Schultz Ex. 2, p. 5).

10. Schultz does not propose to hire any additional personnel for the first three months other than those listed above. (Tr. 195).

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[1] Schultz's Amendment of December 26, 1984; Official Notice Taken.

Schultz's staff will be required to work in a studio space of 200 square feet, which will accommodate a studio control room, Schultz's office, the bookkeeper/traffic person's office and a production room. (Tr. 188). Schultz does not intend to provide air conditioning in an area where the temperature sometimes climbs to as high as 101°-102°. (Tr. 190). He does not intend to hire any sales staff or news personnel. *Id.* Schultz proposes to do all of the sales for the station himself. (Tr. 195-96). He expects that he will devote approximately 20 hours per week to selling. (Tr. 196).

11. Schultz would not produce his own commercials. (Tr. 204). He proposes to sell an advertising contract to an advertiser, and then direct the advertiser to one or more local advertising agencies which have facilities to make commercials. The agency would write the copy and produce the commercial, charging the advertiser a fee for the service. (Tr. 204-205). Schultz did not know, and has not asked any agencies what they would charge the advertiser for the writing and production service. (Tr. 206). He has inquired of several agencies whether they have production facilities available (Tr. 205), and has asked agency personnel to "get their tape recorders ready." (Tr. 206). Schultz would ask that the commercials be produced on a tape cassette, if the agency can do it (Tr. 208), as he does not have on hand, and does not plan to purchase initially any cartridge or "cart" record/playback.

12. Schultz described his typical day of getting up at 6:15 a.m., going to work at 7:20 - 7:30 a.m. until 4:30 p.m. He usually goes downtown for dinner and is back home by 6:30 - 7:00 p.m. He takes correspondence course or works at reading FCC materials and planning for the present proceeding. He normally retires at 10:00 p.m. (Tr. 231-234).

13. On occasion, Schultz's duties as a communications installer and repairer for the Bureau of Land Management requires him to work long hours. This occurs when there is a range fire in the area, and two-way communications equipment is necessary to be installed and maintained for the firefighting command center. (Tr. 235).

II. The Financial Issue.

14. Schultz has $101,000 on deposit in a money market account with First Federal Savings, in Sparks, Nevada.[2] The funds are not

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[2] The funds were initially in an account held in the name of Mr. Schultz, his brother, his sister-in-law, and a family friend. On April 1, 1985, the funds were withdrawn from that account and placed in an account in Mr. Schultz's name alone. (Tr. 210-215).

in a time deposit, no penalty will be payable for early withdrawal. (Tr. 216). The funds are in his name alone, and while he has the unrestricted ability to withdraw those funds at any time, he has "earmarked" them for the specific purpose of construction and initial operation of his proposed radio station (Tr. 237). He also has $3,500 on deposit in a savings account, and will receive a lump sum payment of $7,500 for his accrued retirement contributions when he resigns from the Department of the Interior Bureau of Land Management (Schultz Ex. No. 2, p. 6).[3]

15. Schultz has no debts other than $20,720.40 owed to communications counsel, which he is paying off at the rate of $600.00 per quarter. (Schultz Ex. No. 2, p. 3; Tr. 200).

16. The funds on deposit with First Federal Savings were a gift from Schultz's brother Marc Simoncini (Tr. 210). There is no expectation, by Schultz or by Simoncini, that the gift will be "repaid," because it is not a loan (Tr. 215). Schultz does, however, feel that he is under a moral obligation to repay his brother's kindness at some time in the future (Tr. 215). Despite this feeling of moral obligation on Schultz's part, Schultz stated that there will be no "repayment" of the gift until after the station becomes profitable and that he has no intention of taking any steps which would impair the ability of his radio station to operate. (Tr. 215).

17. Schultz proposes to construct his radio station as follows:

(a) He will purchase a used transmitter and associated equipment from KTDY(FM), in Lafayette, Louisiana for $10,000, in cash. (Tr. 238). The equipment is presently in use by KTDY (FM) but will no longer be needed when the station improves its facilities in June of 1985 (Schultz Ex. No. 2, p. 1). Schultz has discussed the purchase of the equipment with KTDY(FM)'s chief engineer, Pat Shirley, who agreed to advise him should anyone else make an offer on the equipment. Schultz has a "right of first refusal" on the equipment. (Tr. 182).

Schultz estimates that the cost of transporting the equipment from Lafayette, Louisiana to Sparks, Nevada will not exceed $2,500[4] and states that should the equipment no longer be available when he obtains a construction permit other comparable equipment is readily available at comparable prices (Schultz Ex. No. 2, p. 1).

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[3] If Federal Gift Tax is payable on the funds given to him by his brother, he rather than his brother, will pay the tax (Tr. 212-213). However, it seems apparent that no such tax will be payable, because Section 2505 of the Internal Revenue Code provides for a credit of $121,000. (A copy of the pertinent provisions of the Code was provided by Schultz, Official Notice Taken.) The gift to Schultz of $101,000 was less than the amount of the available credit. Accordingly, only an information return will have to be filed. This rationale is disputed in Comstock's Reply Findings, *infra*, it appears.

[4] This figure was obtained by doubling and then adding $500 to a previously

(b) Schultz will obtain additional equipment, including an antenna transmission line, and STL system, from Broadcast Services Company, in Sparks, for $17,961.05 plus shipping charges of $200. Auxiliary power equipment will be acquired from Nevada Generator Systems, in Sparks, for $4,957 plus freight ($317.76) and taxes ($298.50) (Schultz Ex. No. 2, pp. 1–2).

(c) Schultz already owns the following studio equipment, which he testified will be all that he requires to operate the station initially:

Item	*Number*
Microphones (broadcast quality)	2
Microphones (voice grade)	2
Turntables	4
Tonearms	4
Reel-to-reel tape recorders	2
Cassette record and playback	2
Cassette playback only	3
Blank tape	2 boxes
Broadcast mixer board	1
Monitor que amp	1
Line amplifiers	2
Speakers	4
Mixers	2
Over air monitors	2

All of the above listed equipment is broadcast quality, with the exception of the two voice quality microphones and one of the two cassette recorders, which is adequate for playback purposes but does not record adequately for broadcast use (Schultz Ex. No. 2, p. 3). Schultz also owns studio and office equipment, including four tables, four chairs, a book shelf, and a four drawer filing cabinet. He has a library of in excess of five hundred phonograph records (Schultz Ex. No. 2, p. 3).

(d) The equipment to be acquired by Schultz will be installed under his supervision and with his assistance by Broadcast Services Company, at a total cost of $1,130 (Schultz Ex. No. 2, p. 2).

(e) Electrical and telephone installation will cost a total of

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received quote on shipping more equipment from Greely, Colorado to Sparks. Mr. Schultz testified that Lafayette is approximately 710 miles from Sparks, while Lafayette is approximately 1500 miles from Sparks (Official Notice Requested).

$1,744.00 (Schultz Ex. No. 2, p. 2).

Schultz's total construction costs will, therefore, be $39,126.26 (Schultz Ex. No. 2, p. 3).[5]

Schultz costs to operate the facility for the initial three-month period will be as follows:

Studio and office rental (5 months)	$3,000.00[6]
Telephone service	266.40
Electric power	2,381.60[7]
Office supplies	1,100.00[8]
Employee costs	18,720.00
Automobile expenses	258.00[9]
Total	25,726.00

18. Schultz needs $910.00 per month for personal living expenses (Schultz Ex. No. 2, p. 6), and is obligated to pay his attorneys $600 every three months in respect of prior legal fees (Schultz Ex. No. 2, p. 3). He has no other financial obligations. (Schultz Ex. No. 2, p. 3).

19. Schultz's total costs of construction and initial operation of $64,852.26, plus $2,500 worth of spare transmitter parts, five months living expenses ($4,550) and payments to his attorney of $200 per month over a period of one year ($2,400), will amount to $74,302.26 which is $37,697.74 less than the $112,000 cash available to him from the account at First Federal Savings, his

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[5] There may be additional costs of no more than $2,500.00 for spare parts for the transmitter and associated equipment (Tr. 184).

[6] This is based on a charge of $1.00 per square foot per months for three hundred square feet of transmitter space and three hundred square feet of studio-office space. The $1.00 per square foot figure was obtained from the proposed lessor of Schultz's transmitter space, in a "high rent district" of Reno. Schultz testified that rental charges in Sparks, where his studio-office will be located, are significantly lower, on the order of $0.50-$0.60 per square foot, and that he is aware of several available sites there (Tr. 194). However, the high $1.00 per square foot figure was used for both studio and transmitter space, to be conservative (Tr. 188–189).

[7] During cross examination, Mr. Schultz revised his initial projection of $2,181, upward by two hundred dollars to provide for five, rather than three months electricity use to his proposed studio (Tr. 193).

[8] Schultz stated that his projection of the cost of office supplies is probably excessive (Tr. 229).

[9] Schultz will be using his personal automobile, a Volkswagen Beetle, (Tr. 236) for station related duties and that it will probably need more fuel than is presently the case. Mr. Schultz testified that his automobile gets approximately 240 miles per tank of gasoline, and that a tank of gasoline costs approximately $10.75. (Tr. 237).

Assuming that Schultz will drive 500 miles per week on station business (which seems a very high estimate), the additional fuel will cost him $86.00 per month or $258 during the initial three months of operation.

$3,500 savings account and the more than $7,500 lump sum payment[10] he will receive from the United States government when he resigns his position. (Tr. 199).

20. While Schultz wanted to hold the option to use the $101,000 on deposit at First Federal as collateral for a loan to purchase necessary equipment, he will use the funds to make the purchases should such financing prove unavailable on acceptable terms. (Tr. 215-118; Tr. 238-239).

Ultimate Findings and Conclusions

III. Staffing Issue.

21. In adding this issue, the Review Board, while expressing some possible disdain in its remand, noted that Schultz be given assurance of "adequate notice and opportunity on the obvious concerns" adding that "[w]e admonish in advance, however, that contradictions in evidence and testimony will be construed in their ordinary legal fashion and that no comparative 'upgrading' over original proposals will be permitted." (FCC 85R-5 at para. 5). Yet, though Schultz's earlier notion to operate his proposed station with no employees suggested Herculean commitment, this side of realism, given further and sober thought, albeit afterthought, he did amend his application to propose a more enlightening staffing proposal. (*See Memorandum Opinion and Order*, FCC 85M-1599, released April 12, 1985, para. 7). That amendment was unopposed and was accepted under governing law with the *caveat* of no comparative advantage.

22. The Schultz latest staffing proposal of a full-time staff of five (three announcers, a secretary and himself) and a part-time staff of six (all announcers) for the type of facilities here appears reasonable. To say this, no enhancement is endowed to Schultz under abiding comparative canons. Simply stated, his first proposal smacked of seeming naivete' faced with the customary demands of a start-up operation of an FM station. Yet, then as now, Schultz would be credited with the important comparative criterion of 100% integration of ownership and management, buttressed, of course, with the more realistically promising staffing proposal. Under such conditions the penetrating discernment of the remanding authorities has been, in this mind, not only vindicated but, more to the point, met and honored by Schultz's corrective response in his amendment. The standards of

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[10] According to the wage statement he receives every two weeks, more than $7,500 is now available in his account. (Tr. 198).

ordinary legal meaning would neither be disparaged or demeaned under these circumstances, bottomed on the properly amended original Schultz proposals. Had Schultz been denied his quest to amend, his whole standing may have been fatally imperiled. *Azalea Corp., et al.*, 31 FCC 2d 561, 563.

23. Thus, while Schultz's latest staffing proposal might be "frugal, rigorous and demanding," he is a relatively young person in apparently good health, unmarried and accustomed to long and trying hours and hardships in his present occupation confronting "range fires" and "other emergencies"; the evidence would not suggest that he would be unable to fulfill his commitments, however supposedly Herculean. Hence, it is found under the evidence that Schultz's staffing proposal is adequate to effectuate his object. *Cf. Bisbee Broadcasters, Inc.*, 31 RR 2d 71 (Rev. Bd., 1974).

24. *Financial Issue.* Schultz relies on three sources of funds to meet his estimated costs and personal expenses: $3,500 in two bank accounts, a distribution of retirement earnings in the amount of $7,500 which is to be expected upon resignation of his U.S. Government position, a resignation he would effect in order to construct and operate the proposed station; and $101,000 from his brother, which is a savings and loan account, an amount which Comstock emphasizes as a "gift."

25. While repeating a dark shadow of doubt respecting the full efficacy of Schultz's $101,000 "gift" urging that a Federal Gift Tax would attach to someone, Comstock nevertheless urges that Schultz's estimate of total costs of $64,594.26 and a surplus of $36,045.74, from "this cushion one must subtract additional Comstock itemized costs of $75,382 leaving ultimately, including "the cushion," of a deficit of $38,976. (*Comstock* Proposed Findings at 28-29).

26. In his Reply Findings, Schultz rejects the deficit comments projected above by Comstock saying — that his proposal to purchase a used transmitter for $10,000 — is realistic and with reasonable assurance not only from Schultz's discussion with Station KTDY(FM)'s chief engineer, but also in the marketplace of used radio transmitting equipment; Schultz also would have it that the Comstock thesis that Schultz's testimony is but "hearsay." Noting that Comstock's challenge of "hearsay" occurred after Schultz had been excused following cross-examination, Schultz, citing *McCormick on Evidence*, Chapters 25-37 — West Publishing Co. 1954, relates that "the tendency is toward, rather than away from the receipt of such evidence." That notion is the

true state of the Law of Evidence, in this view, and particularly so in these premises where the Federal Rules of Evidence apply but also where those Rules may be relaxed to serve the ordinate ends of justice. But even putting aside that observation, nothing that Comstock speculates would undermine the reliability of Schultz's proposals concerning the availability of the equipment he intends to purchase and, hence, his $10,000 for the transmitter, be it used or other, would remain unaffected as an item of cost; not the $40,000 Comstock suggested new transmitter cost.

27. Much the same may be said for the other Comstock projected additional costs concerning legal fees – $20,724.40 with continued payments of $600 by Schultz every three months until that sum is eliminated and no other payments to be made until after the completion of the third month of operation and none whatever during the current remand; the projected payments on a $60,000 loan – a loan not relied on or planned save for Schultz wishing "to hold open" such an option; lastly the Comstock projected gift tax on the $101,000 under Section 2505 of the Internal Revenue Code, as annexed by Schultz in his Reply Findings, would not require him "to make any tax payments" on that gift.

28. Schultz would agree that his "financial proposal inadvertently made no provision for an auxiliary power generator," though he would have "ample funds" to acquire a second generator, he would concede a slight comparative demerit under precedent for that oversight. Whatever Comstock's projected deficit items, the evidence would allow that, in any event, Schultz would still have a financial cushion of at least $22,000, assuming there were substance to such projections.

29. In its Reply Findings, Comstock concedes that Section 2505 of the Internal Revenue Code provides for a credit against gift taxes up to $155,800 in the tax year 1986 with lesser amounts in earlier tax years. But, urges Comstock, the tax is still imposed even though Schultz's donor brother "may opt" to charge the gift tax against unified credit in his estate; the fact is that Schultz stated *he* would pay the tax; that, in any event, the gift is not "free" without significant tax consequences. Also, now that Schultz "has now changed his story" to allow his brother's estate to pay the tax after all, this is a further example of the "vacillation of Mr. Schultz and clear evidence of his lack of credibility and non-reliability."

30. Comstock attacks the feasibility, indeed the possibility of Schultz's being able to meet the additional costs Comstock calculated against him, a sum in excess of $75,000. Comstock lists a series of "forgots" by Schultz. He "forgot" about auxiliary power — a "forgot" conceded; he "forgot" station refurbishing and installation costs — Schultz claims possession of all studio necessities and can perform all installation himself; he "forgot" about the summer heat at Sparks, Nevada, thus, air conditioning costs; Schultz responds that a converter blower (flow air transfer) would be sufficient; also Comstock disparages Schultz's plans and schedules to pay off his legal fees, as well as Schultz's unsupported reliance on a "used transmitter" at a price of $10,000.

31. Apparently, Schultz's counsel is not displeased with Schultz's proposed payments and payment schedule and "that no legal fees beyond those amounts will be paid until after completion of the third month of operation" (Schultz, Ex. No. 2; Schultz Reply Findings at 9). Likewise, concerning the "used transmitter" and as noted earlier, Comstock's afterthought objection on the "hearsay" nature of Schultz's testimony, the availability of that equipment premised on station's KTDY(FM) chief engineer's stated selling price of $10,000, is reasonably certain; indeed, a substantial number of used FM transmitters are available for purchase at approximately $10,000, Schultz adds. (Schultz Ex. No. 2, p. 1; Schultz Reply Findings at 12).

32. Comstock denigrates Schultz's latest staffing, plan, beside other imperfections, a need for "one additional announcer for a 24-hour operation" and that this is "the latest in a constantly shifting and moving plan of Pepper Schultz"; that no precedential comparison is possible here with the *Bisbee* case, *supra*, and that "Schultz has acted at best with "willful myopia, or at worst, hapless legerdemain," citing *Dutchess Communications Corp.*, FCC 85R-49, released June 13, 1985 at 16). Were rhetoric to rule the day here, Comstock should prevail by a virtual light year. Traditionally, and funtunately, that is not the touchstone in these proceedings.

33. While Schultz may be seen, under the evidence, as something less than a wizard at planning the myriad details of a start-up FM broadcast operation, his latest efforts, particularly in his amendment accepted in FCC 85M-1599, April 12, 1985, adequately address the staffing issue imposed on remand in all of its common attributes; employees, five full-time including himself; hours of work, studio space, his multifaceted duties, many perhaps difficult, but not beyond his ken or endurance, and

sundry other manning requirements. *Cf. United Broadcasting Co,* (KBAY-FM), 53 RR 2d 57 (1983). In like manner, Schultz has adequately responded to and met his assigned burdens concerning his financial qualifications, a companion matter set forth in remand. Whatever the nature of the origins and metamorphoses from loan to unqualified gift from a sibling donor, the $101,000 appears unqualifiedly available and also appears fully adequate to underpin his financial qualifications with a sizeable cushion of approximately $22,000.

For the foregoing reasons, Schultz has reasonably met and discharged his burdens under the added issues; he remains the better candidate for choice of the public franchise there in Sparks, Nevada; besides his earlier established qualifications, his 100% integration of ownership and management remains and is a far better quantitative comparative proposal than the greatly flawed, however resourcefully contrived, distribution of authority by Comstock addressed in the Initial Decision.

That being so, this as a Supplemental Initial Decision SHALL FIND IN FAVOR of Pepper Schultz under the issues added on remand and shall affirm the earlier grant of the Schultz application; consequently, the application of Comstock Broadcasters, Inc. MUST BE DENIED.[11]

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

JAMES F. TIERNEY, *Deputy Chief Administrative Law Judge*

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[11] This being a Supplement to the Initial Decision, FCC 84D-49, released July 30, 1984, the rights of review and appeal attach, as in the case of the Initial Decision itself, under Rule 1.276 (47 CFR 1.276).

AM-FM Duplication
Diversification of Control of Mass Media
Issue, Enlargement of, Denied
Ownership and Management, Integration of

Review Board granted summary affirmance of Initial Decision in comparative FM broadcast proceeding, which awarded winning applicant substantial preferences under the diversification of media control and ownership integration comparative criteria and gave loser a substantial demerit for proposed AM-FM program duplication. Issue enlargement was denied for failure to establish prima facie case. Petitioner essentially relied on hearsay affidavits by affiants who were neither disinterested nor truly knowledgeable.
—*Perry Smith*
MM Docket No. 83-1189

FCC 85R-40

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
PERRY S. SMITH Selmer, Tennessee	MM DOCKET NO. 83-1189 File No. BPH-811112AO
WDTM, INC. Selmer, Tennessee	MM DOCKET NO. 83-1190 File No. BPH-820324AL
For Construction Permit for a New FM Station	

Appearances

John A. Borsari and *David M. Halbreich*, on behalf of Perry S. Smith; and *John B. Kenkel* and *Mark J. Palchick*, on behalf of WDTM, Inc.

DECISION

Adopted: May 2, 1985; Released: May 9, 1985.

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL. BOARD MEMBER BLUMENTHAL CONCURRING WITH SEPARATE STATEMENT IN WHICH CHAIRMAN MARINO JOINS.

BOARD MEMBER JACOBS:

1. In this apparently clear-cut comparative FM broadcast proceeding, the credentials of sole proprietor Perry S. Smith (Smith) completely overwhelmed those of WDTM, Inc. (WDTM). Presiding Administrative Law Judge Joseph P. Gonzalez (ALJ) awarded Smith substantial preferences under the diversification of media control and ownership integration criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965); gave WDTM a substantial demerit for its proposal to duplicate some programming of its already-owned Selmer, Tennessee daytime AM Station WDTM; and granted Smith's application. Initial Decision (I.D.), FCC 84D-76, released October 29, 1984. Nevertheless, WDTM has excepted to each of these conclusions, and, in a separate motion to enlarge issues filed November 27, 1984, it requests that the proceeding be remanded for further hearing on real-party-in-interest, Section 1.65 ownership reporting, abdication of control, and candor/misrepresentation basic and comparative qualifications issues against Smith.

2. Based on our review of the I.D., WDTM's exceptions and motion, Smith's reply pleadings, the oral argument held March 8, 1985, and the existing factual record, we summarily affirm the I.D. and deny WDTM's motion.

3. The ALJ held that Smith deserved a substantial diversification preference because he has no other media interests while WDTM is the 100% owner of the only existing broadcast facility in the proposed FM community of license – WDTM. *See, e.g., KBBS, Inc.*, 91 FCC 2d 115, 52 RR 2d 185 (Rev. Bd. 1982). WDTM challenges only the ALJ's factual predicate; it asserts that the ALJ should have deemed Smith's 50% partnership interest in Radio Management, a radio management consulting business, as constituting a substantial regional concentration of control over media ownership and management in view of the company's alleged "ready access to sales, programming, format, advertising rates and other proprietary information . . . for up-

wards of five radio stations in the general Selmer, Tennessee area." WDTM Br. at 6. Hence, according to WDTM, Smith should be assessed a substantial diversification "demerit." We disagree. WDTM concedes, *id.*, that the hearing record does not attribute to Radio Management any clients at all (Tr. 31)[a] but that Smith "hoped" for five clients (locations unspecified except for one in Trenton, Tennessee, some 62 miles away) within the next six months (Tr. 35). Moreover, Smith testified only that his firm would deal with "programming and sales problems" (Tr. 33), and he explained that he would *not* help his clients sell but would train sales personnel (Tr. 33-34). In other words, WDTM's media concentration allegations are devoid of record support and are completely speculative.[2] Its exception will be denied.[3]

4. Next, WDTM disputes the ALJ's view that Smith will be integrated full time as general manager of his proposed station, although it concedes that the record evidence supports a substantial ownership integration preference if we juxtapose Smith's 100% ownership and putative full-time involvement against the proposed part-time integration proposal of WDTM's 74% stockholder, David B. Jordan. Here again WDTM's exception lacks record support and is completely speculative. WDTM would have us surmise that Radio Management is Smith's "true love" and that his involvement in that business will take priority over his proposed FM station and will prevent him from fulfilling his 40-hour per week station commitment. But, if anything, the

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[1] All transcript references are to the corrected transcript received by the Commission's Dockets Branch on December 20, 1984.

[2] On April 1, 1985, Smith filed a motion for leave to amend which updates Radio Management's activities. The amendment will be accepted for that purpose. It shows that Radio Management currently has three contracts involving four radio stations — WJDS and WQKZ-FM, Bolivar, Tennessee (expires May 31, 1985); WLOT, Trenton, Tennessee (expires August 14, 1985); and KXOQ-FM, Poplar Bluff, Missouri (expires April 30, 1986). Advertising and consulting firms are not media of mass communications, *Jerome Thomas Lamprecht*, 57 RR 2d 1194 (Rev. Bd. 1984), and the potential for media concentration or serious conflict of interest is too remote here, given these station locations and Smith's record testimony as to his role, to warrant any demerit. *Id.*; *Pittsfield Community TV Assn.*, 94 FCC 2d 1320, 56 RR 2d 134 (Rev. Bd. 1983), *rev. denied*, FCC 84-459 (Comm'n 1984).

[3] We also reject WDTM's claim that it deserves a diversification advantage because it is a daytime AM licensee seeking an FM authorization in its community of license. Indeed, in the *Second Report and Order in MM Docket No. 84-231*, FCC 85-124, released April 12, 1985, the Commission has decided to give special consideration to certain such daytime-only AM licensees. However, because that action is prospective only and is limited to applications for FM channels recently alloted to implement BC Docket No. 80-90, Selmer's Channel 288A, which is the subject of this Decision, is beyond the ambit of that limited policy shift.

present record confirms Smith's resolve to effectuate his integration proposal: when he was asked at hearing whether he wanted his radio management business to grow, Smith replied, "*If I remain in this part of the business*, yes." (emphasis added) (Tr. 35).[4] We do not expect applicants to forsake their livelihoods while they prosecute their applications before this agency. Indeed, special zeal may be required to ensure an adequate war chest. Hence, we will not infer lack of a viable integration proposal from the mere existence (and growth) of pre-license business activity without substantial evidence. *See Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 51 RR 2d 1478 (Rev. Bd. 1982), *rev. denied*, FCC 83-415 (Comm'n 1983), *aff'd mem. sub nom. Blake-Potash Corp.* v. *FCC*, No. 83-2112 (D.C. Cir. April 26, 1985). This exception is denied.

5. Finally, WDTM attempts to wipe away its substantial program duplication demerit by arguing that a specially designated issue was required as a prerequisite and that the duplication would be so minimal ("only seven to eight hours a week at most" — WDTM Br. at 11) that it deserves little or no demerit. Both of these contentions fail. First, it is well established that evidence regarding program duplication is admissible under the standard comparative issue without the need for a specially designated issue. *E.g.*, *WGUF, Inc.*, 58 FCC 2d 1382, 36 RR 2d 1619 (Rev. Bd. 1976). The amount of duplication and the benefits and detriments associated with it affect the magnitude of the potential demerit, not the basic admissibility of the duplication evidence. Second, in the instant case, the amount of duplication has not been pinpointed. Tr. 118-120 suggests that it would be less than 11-1/2 hours per week, but the ALJ called the amount "unspecified," I.D., para. 37. However, it is undisputed that WDTM failed to submit any evidence of duplication benefits. *Id.* This dereliction alone is sufficient to justify the questioned demerit, "[f]or one who proposes no duplication is in a substantially better comparative position than an opponent who proposes some duplication" and the size of the demerit depends essentially on the extent of the countervailing benefits deriving from the

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[4] We note but decline to credit at this late date Smith's recent clarification that "it has always been my intention that upon grant of the Selmer, Tennessee FM permit I would devote my full time and efforts to this new radio station." April 1, 1985 Motion for Leave to Amend, *supra* n.1 at 3. *Cf. Angeles Broadcasting Network*, FCC 84-495 (Comm'n 1984), in which the Commission credited a similar submission in response to its own request for a specific accounting of a principal's present and proposed time commitments. We made no such request here.

duplication where only one applicant proposes to duplicate. *CJL Broadcasting, Inc.*, 95 FCC 2d 544, 546–47 and n. 11, 54 RR 2d 1037, 1040 and n. 11 (1983). Therefore, this exception will also be denied.

6. What remains for consideration is WDTM's enlargement motion. See paragraph 1, *supra*. The proponent of such a motion has the burden of coming forward with a *prima facie* showing in support of the requested issues, in accordance with Section 1.229(d) of the Commission's Rules, 47 CFR 1.229(d). *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1097, 50 RR 2d 1251, 1257 (Rev. Bd., 1982), *rev. dismissed*, FCC 831–129 (Comm'n 1983). That rule requires specific allegations of fact supported by affidavits of a person or persons having personal knowledge thereof. In the instant case, WDTM's motion is essentially supported by the hearsay and double hearsay affidavits of two WDTM employees. In response, several affidavits have been submitted by Smith and others who directly contradict the "facts" alleged by WDTM, such as the December 18, 1984 rebuttal affidavit of Commission licensee Mack T. Hale asseverating that Hale is indeed the 100% owner of Station WLOT. While hearsay that is relevant and material is admissible in administrative proceedings, *e.g.*, *Johnson* v. *United States*, 628 F. 2d 187, 190 (D.C. Cir. 1980), the weight to be accorded it depends on its truthfulness, reasonableness, and credibility. *Id.* at 190–91. And a prime indicium of probity is whether the declarants are disinterested witnesses. *Id.* at 191. Moreover, "[c]ontradictory allegations and affidavits which create some possibly unresolved factual issue do not invariably necessitate an evidentiary hearing . . ." *Broadcast Enterprises, Inc.* v. *FCC*, 390 F.2d 483, 485 (D.C. Cir. 1968). We conclude that WDTM's motion has failed to establish the requisite *prima facie* case for issue enlargement. Its affidavit underpinnings are shallow and fully controverted by truly knowledgeable affiants, leaving a petition based on speculation and surmise rather than facts. More is required to heat the hearing crucible. *See Scott & David Enterprises, Inc.*, *supra*, 88 FCC 2d at 1099, 50 RR 2d at 1258.

7. ACCORDINGLY, IT IS ORDERED, That the motion to enlarge issues filed by WDTM, Inc. on November 27, 1984 IS DENIED;

8. IT IS FURTHER ORDERED, That the motion for leave to amend filed by Perry S. Smith on April 1, 1985 IS GRANTED to the extent indicated in footnotes 2 and 4 of this Decision and the amendment is ACCEPTED; and

9. IT IS FURTHER ORDERED That the application of Perry S. Smith (File No. BPH-811112AO) for a construction permit for a new FM station at Selmer, Tennessee IS GRANTED, and the application of WDTM, Inc. (File No. BPH-820324AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

JEROLD L. JACOBS, *Member, Review Board*

Concurring Statement of Board Member Norman B. Blumenthal In Which Chairman Marino Joins

I use this opportunity, once again, to call attention to the fact the Commission's policy on duplicated AM/FM programming appears anachronistic and inharmonious with current agency policies which firmly hold that a licensee's general choice of programming is not a matter of government concern. *See CJL Broadcasting, Inc.*, 88 FCC 2d 750, 761 (Rev. Bd. 1981).[1]

In its concurring statement in *CJL*, the Board majority observed that the Commission's *Policy Statement Re Changes in the Entertainment Formats of Broadcast Stations*, 60 FCC 2d 458 (1976), *recon. denied*, 66 FCC 2d 78 (1977),[2] indicated an intent to rely on marketplace forces to guide a licensee's overall program selections. *See* 88 FCC 2d at 761–762. This reliance on marketplace forces to shape licensee programming choices was broadly expanded in *Deregulation of Radio*, 84 FCC 2d 968 (1981), *remanded on other grounds sub nom. Office of Communication of the United Church of Christ* v. *FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

In its review of the Board's decision in *CJL Broadcasting*, the Commission "[did] not reach" the duplication of AM/FM programming policy issue, *see* 95 FCC 2d at 549 n.27[3]; accordingly, the obsolete policy is applied in this case. *See ante* para. 5. We are now nearly a decade past the Commission's *Entertainment Format Policy Statement*, *supra*, and three years beyond *Deregulation of Radio*, *supra*. Although the Commission declined to reach its asymmetrical programming policies in *CJL Broadcasting* "[f]or the present time," *see supra* note 3, I have every hope that it will squarely address that policy issue in the context of this latest case. For a broadcast licensee should have the actual freedom to select its programming sources, even if that programming is — in part or whole — duplicative of another source. As was recently observed by the president of ABC radio, "[m]any portable radios carry only the FM band,"[4] and many other receivers (*e.g.*, automobile radios) yet receive only AM signals. To the individual *listeners* of either the AM or the FM station, any duplication is wholly irrelevant; it is the *availability* of the programming that is important. Further, if the duplicating licensee is merely splitting its market for the identical programming, the laws of economics will tap the licensee long before the strictures of the bureaucracy; if the duplicated programming reaches a different audience, then there would seem to be little spectrum waste, and the agency's prior concerns would appear to be misplaced. Either way, AM/FM programming duplication is, perforce, one of those matters ideally suited for reliance on marketplace choice.[5]

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[1] The Board's licensing decision in that case was reversed by the Commission on other grounds. *CJL Broadcasting, Inc.*, 95 FCC 2d 544 (1983).

[2] The Commission's *Entertainment Format Policy Statement* was ultimately affirmed by the Supreme Court, *see FCC* v. *WNCN Listeners Guild*, 450 U.S. 582 (1981).

[3] While it may not have "reached" the issue, it effectively surrounded the policy question by a notation that, "[*f*]*or the present time*, we find that the non-duplication policy serves as an important spectrum management tool and therefore continues to be a factor warranting consideration on the Commission's licensing determinations." *Id.* (emphasis added).

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[4] *See J.B. Broadcasting of Texas, Inc.*, FCC 85R-32, released April 22, 1985, Dissenting Statement at n.4 (*quoting Television/Radio Age*, January 21, 1985, at p.45).

[5] Reconciling its programming policies will coincidently relieve the Commission of the rather anomalous burden it faced in *Victor Broadcasting, Inc.* v. *FCC*, 722 F.2d 756 (D.C. Cir. 1983), in convincing the court that, while it considered the renewal applicant's AM/FM duplication "wasteful," it concurrently considered it "superior." The *Victor Broadcasting* court split 2-1 (Wilkey, J., dissenting).

FCC 84D-76

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of	
PERRY S. SMITH Selmer, Tennessee	MM DOCKET NO. 83-1189 File No. BPH-811112A0
WDTM, INC. Selmer, Tennessee	MM DOCKET NO. 83-1190 File No. BPH-820324AL
For Construction Permit for a New FM Station	

Appearances

John A. Borsari and *David M. Halbreich* on behalf of *Perry S. Smith*; and *John B. Kenkel* on behalf of WDTM, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: October 23, 1984; Released: October 29, 1984

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Perry S. Smith (Smith) and WDTM, Inc. (WDTM) for a construction permit for a new FM broadcast station to operate on Channel 288A in Selmer, Tennessee. Both applicants were found by the Mass Media Bureau to be legally, technically and financially qualified. The applications were designated for hearing in a consolidated proceeding pursuant to a Hearing Designation Order released on November 7, 1983 (Mimeo No. MM 660) on the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A hearing was held on May 8, 1984. The record was closed on June 4, 1984 (Order, FCC 84M-2558, released June 5, 1984). The parties filed Proposed Findings of Fact and Conclusions of Law on June 29, 1984 and Reply Findings on July 13, 1984.

Findings of Fact

Perry S. Smith

3. The applicant, Perry S. Smith, is a sole proprietorship (Smith Ex. 1).

4. Mr. Smith was born in Vero Beach, Florida on August 13, 1953. He moved to Selmer, Tennessee in 1955 where he attended high school, and he remained a resident of Selmer until 1976 when he moved to Jackson, Tennessee. Mr. Smith spent a total of 21 years living in Selmer, Tennessee (Smith Exs. 2 and 4). He recently moved to Bethel Springs, McNairy County, Tennessee, a community which lies within the 1 mV/m service area of his proposed station (Smith Ex. 2; Tr. 16).[1]

Diversification

5. Mr. Smith has no interests in any medium of mass communications (Smith Ex. 3).

6. On April 1, 1984, Mr. Smith and J. A. Baxter formed Radio Management, a Tennessee partnership, set up to provide consulting services to radio stations in the areas of sales and programming (Smith Ex. 2). As of the date of the hearing, the partnership had no clients (Tr. 34). However, according to Mr. Smith's testimony, the partnership has several prospective clients, and he anticipates having approximately five stations signed up within six months (Tr. 34, 38).

Integration

7. Mr. Smith will serve as general manager of the proposed station, devoting at least 40 hours a week to his duties at the station (Smith Ex. 4). As general manager, Mr. Smith will be responsible for all major decisions at the station, and he will supervise all employees (Smith Ex. 4).

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[1] All page references are to the transcript received by the Commission on May 21, 1984.

8. While a resident of Selmer, Mr. Smith was a member of the First Baptist Church of Selmer and of the Royal Ambassadors, a convention of the Southern Baptist faith. In addition, Mr. Smith was a member of the Selmer Junior Jaycees and served as one of its directors in 1975. Between 1973 and 1976, Mr. Smith was a volunteer fireman in Selmer, and a reserve deputy sheriff between 1975 and 1976 (Smith Ex. 2).

9. Mr. Smith began his career in broadcasting at Station WWTX (FM), Corinth, Mississippi, where he held the position of Public Service and Sports Director with additional responsibilities in the areas of sales and programming. In 1974, Mr. Smith began working for Station WDTM(AM), Selmer, Tennessee, in a sales and programming capacity, and in 1975 he became reassociated with Station WWTX, Corinth, Mississippi, ultimately serving as the station's Assistant Manager (Smith Ex. 4). In 1981, Mr. Smith was hired by Station WJHR(FM), Jackson, Tennessee in a sales and marketing capacity, and in November 1981 he became Station Manager. He remained there until April 1983 (Smith Exs. 2 and 4). After leaving Station WJHR, Mr. Smith served as Sales Manager for Station WLOT(FM), Trenton, Tennessee between June and August 1983, and subsequently became General Manager of Stations WBOL(AM) and WVST(FM) (now WJDS(AM) and WQKZ(FM)), Bolivar, Tennessee. Mr. Smith resigned on April 1, 1984, and is currently a partner in a broadcasting consulting business (Smith Exs. 2 and 4).

WDTM

10. WDTM is a Tennessee corporation organized on February 10, 1968. David B. Jordan is President, Treasurer and a Director with 222 shares of common voting stock, or the equivalent of 74 percent of the shares of stock issued and outstanding (WDTM Ex. 1). Margaret E. Jordan (Mrs. David B. Jordan), Vice President, Secretary and a Director of WDTM, owns 78 shares of common voting stock, or 26 percent of the stock issued and outstanding (WDTM Ex. 1).

11. David B. Jordan was born in Henderson County, Tennessee on July 23, 1925. He is currently a resident of Jackson, Tennessee and has lived there for the past two years. Mr. Jordan will continue to reside in Jackson in the event that WDTM is awarded the construction permit for Channel 288A in Selmer, Tennessee (WDTM Ex. 2).

Diversification

12. David B. Jordan is President, Treasurer and a Director, as well as 74 percent shareholder of WDTM (WDTM Exs. 1 and 4). WDTM is the licensee of Selmer, Tennessee's only radio station.

13. Mr. Jordan is also President, a Director and 90 percent shareholder of WJPJ, Inc., the licensee of Station WJPJ(AM), Huntingdon, Tennessee, a community located approximately 50 miles from Selmer (Smith Exs. 6 and 7). Mr. Jordan also serves as an officer, director and 25 percent shareholder in the Virginia-Kentucky Broadcasting Co., Inc., the licensee of Stations WNRG(AM) and WMJD(FM), Grundy, Virginia (WDTM Ex. 4; Tr. 83). He is also the chief operating officer for that company (Tr. 84). Grundy, Virginia is located approximately 407 miles from Selmer, Tennessee (Smith Exs. 6 and 7). In addition, Mr. Jordan is an officer and director of the Greater Kentucky Broadcasting Corporation, the licensee of broadcast Station WNVL(AM), Nicholasville, Kentucky as well as an officer and director of the Lawrence County Broadcasting Corporation, the licensee of Station WVKY(AM), Louisa, Kentucky (WDTM Ex. 4). Selmer is approximately 315 miles from Nicholasville, Kentucky and 405 miles from Louisa, Kentucky (Smith Exs. 6 and 7).

Integration

14. David B. Jordan proposes to devote at least 20 hours a week on an average quarterly basis to the operation of the proposed station (WDTM Ex. 5). As general manager and the chief executive officer, Mr. Jordan will supervise and manage the operations of the proposed facility, but, according to his testimony, he will not be involved in many of the day-to-day activities of the station. He will, however, maintain control of the overall performance of each of the station's employees (WDTM Ex. 5).

15. Although not a resident of Selmer, Mr. Jordan testified that with the help of one of his former employees at Station WDTM, Selmer, Tennessee, he used the facilities of that station to organize four fund-raising Talk-A-Thons, devoting a total of approximately one to two hours to the first Talk-A-Thon and very little time thereafter to each succeeding Talk-A-Thon (Tr. 60–63).

16. Mr. Jordan's broadcast experience began in 1948 with Station WIBR(AM), Enterprise, Alabama (WDTM Ex. 2). Since then he has had extensive on the air, management and ownership experience with broadcast stations located in Tennessee, Kentucky, Virginia and West Virginia.

Program Duplication

17. WDTM proposes to duplicate some of WDT(MAM), Selmer, Tennessee's news, public affairs, religious and sports programming on the new FM station (Smith Ex. 9; Tr. 119-123).

Auxiliary Power

18. Both Smith and WDTM will install an auxiliary power supply at the broadcast station so that service would be continued in the event that electrical power is interrupted for any reason (Smith Ex. 5; WDTM Ex. 6).

Conclusions of Law

Diversification

19. Mr. Smith does not have any interest in any medium of mass communications. He is, however, a partner in Radio Management, a partnership set up to provide consulting services to radio stations in the areas of sales and programming. From the evidence of record, it appears that the activities of the partnership do not involve the dissemination of information to the public. Mr. Smith's interest in the partnership is found, therefore, to be of no decisional consequence under the Commission's diversification policy.

20. WDTM is the licensee of the only radio station licensed in Selmer, Tennessee. In addition, David B. Jordan, WDTM's 74 percent owner, owns 90 percent of the stock in WJPJ, Inc., the licensee of radio Station WJPJ(AM), Huntingdon, Tennessee and a 25 percent stock interest in Virginia-Kentucky Broadcasting Co., Inc., the licensee of radio Stations WNRG(AM) and WMJD(FM), Grundy, Virginia. In addition, Mr. Jordan serves as President and a Director of WJPJ, Inc., as well as an officer and director of Virginia-Kentucky Broadcasting Co., Inc. He is also an officer and director of the Lawrence County Broadcasting Corporation, the licensee of WVKY(AM), Louisa, Kentucky, and an officer and director of the Greater Kentucky Broadcasting Corporation, the licensee of WNVL(AM), Nicholasville, Kentucky.

21. According to Mr. Jordan's testimony, WDTM, the licensee of Selmer's only radio station, WDTM(AM), filed its application for the FM facility so that WDTM could provide a nighttime broadcast service to the Selmer community (WDTM Ex. 2). On the basis of this testimony, WDTM argues that it is entitled to a special upgrade under the diversification criterion.

22. Although the Commission encourages daytime only AM stations to acquire affiliated FM facilities, and has indicated that in such instances the diversification preference would be somewhat mitigated, *see, Voice of Dixie, Inc.*, 41 FCC 2d 550 (Rev. Bd. 1973) and *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969), the Commission does not consider such a factor to be a valid basis for disregarding such ownership in a comparative evaluation of applicants. *See, KALT-FM, Inc.*, 49 FCC 2d 61, 31 RR 2d 765 (Rev.Bd. 1974). The Presiding Judge concludes therefore that WDTM's ownership of the only radio station in Selmer entitles Smith, who has no media interests, to a substantial preference under the diversification criterion since he would constitute a new voice in the Selmer community. This preference is further strengthened by Mr. Jordan's other media interests which include a majority ownership of a radio station located in a community approximately 50 miles from Selmer.

Best Practicable Service

23. Mr. Smith is a sole proprietor who proposes a 100 percent full-time integration of ownership into management. Mr. Smith will serve as the proposed station's general manager which is clearly a position of managerial responsibility. *See, Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Mr. Smith is, therefore, entitled to a 100 percent integration credit.

24. WDTM claims a 74 percent part-time integration credit for its proposal to integrate Mr. Jordan. According to his testimony, Mr. Jordan would devote 20 hours a week on a *quarterly basis* (emphasis supplied) to his duties at the station. To be entitled to a credit, a commitment must be on a weekly basis. *See, High Sierra Broadcasting, Inc.*, 55 RR 2d 627 (Rev. Bd. 1983). In this case, Mr. Jordan's commitment is on a quarterly basis; there is no commitment on his part to work 20 hours a week. The Presiding Judge concludes therefore that such a commitment is not entitled to any credit since there is no assurance that Mr. Jordan will devote 20 hours on a weekly basis to his duties at the proposed station. WDTM is therefore not entitled to any integration credit for its proposal to integrate Mr. Jordan into the affairs of the proposed FM station in Selmer.

25. The Presiding Judge finds that Smith is entitled to a substantial comparative preference under the best practicable service criterion. Even if we were to credit WDTM with a 74 percent part-time integration credit, Smith would still be entitled

to a substantial integration preference over WDTM since it is well established that to the extent that the time spent is less than full time, the credit will drop sharply. *See, WHDH, Inc.*, 16 FCC 2d 1, 13 (1969).

26. In view of the substantial preference awarded Smith for his integration proposal, the Presiding Judge concludes that it is unnecessary to consider any qualitative enhancements since they are of significance only where the quantitative integration proposals are otherwise equal. *See, WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982); *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981); and *The New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (Rev. Bd. 1981).

Duplicate Programming

27. WDTM has indicated that it intends to duplicate an unspecified amount of the programming aired on its AM station in Selmer on the proposed FM station. As a matter of policy, the Commission does not look favorably on the use of two frequencies to bring a single broadcast program to the same receiver location, *see, WLCY, Inc.*; 17 FCC 2d 338 (Rev. Bd. 1969); and the degree of the demerit assessed in such a situation, that is whether it is substantial, moderate or slight, depends on the extent to which there are countervailing benefits deriving from the duplication. *See, Jones T. Sudbury*, 8 FCC 2d 360 (1967). WDTM failed to submit any evidence of benefits that would accrue to the public from its proposed duplication; this fact, coupled with the fact that Smith does not propose any duplication warrants the assessment of a substantial demerit against WDTM under this factor.

Auxiliary Power Source

28. Each applicant proposes to use an auxiliary power source. Therefore neither applicant is entitled to any preference for its proposal to employ such a system.

Ultimate Conclusion

29. The Presiding Judge has awarded a substantial preference to Smith under the diversification criterion and the best practicable service criterion, and a substantial demerit against WDTM under the duplicate programming factor. Smith's proposal is therefore clearly the preferred proposal, and the one that is most

likely to serve the public interest. Accordingly, the permit for the new FM station in Selmer, Tennessee will be awarded to Smith.

Ruling

30. IT IS ORDERED that unless an appeal from the Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Perry S. Smith (MM Docket No. 83-1189, File No. BPH-811112AO) for a construction permit for a new FM station to operate on Channel 288A in Selmer, Tennessee IS GRANTED; and the application of WDTM, Inc. (MM Docket No. 83-1190, File No. BPH-820324AL) IS DENIED.[2]

FEDERAL COMMUNICATIONS COMMISSION

JOSEPH P. GONZALEZ, *Administrative Law Judge*

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[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Application, Filing
Application, Processing of
Frequency Coordination
Frequency Management
Private Land Mobile Services

Report and Order adopted revising the frequency coordination rules and procedures in the Private Land Mobile Radio Services.

—*Private Land Mobile Radio Serv.*
PR Docket No. 83-737

FCC 86-143

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	
Frequency Coordination in the Private Land Mobile Radio Services	**PR Docket No. 83-737**

REPORT AND ORDER

Adopted: April 3, 1986; Released: April 15, 1986

BY THE COMMISSION:

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Summary

1. By this *Report and Order*, the Commission is modifying the procedures by which most of the frequencies allocated to the private land mobile radio services are assigned to individual applicants. These modifications are being made in that phase of the assignment process referred to as "frequency coordination." Frequency coordination is the process by which a private organization recommends to the Commission the most appropriate frequencies for applicants in the designated radio services.

Background

2. Each year the Commission receives approximately 350,000 applications for licenses to operate radio stations in the private land mobile radio services in order to meet the critical mobile

communications requirements of this nation's businesses, utilities, health care providers and state and local governmental entities. The process of identifying appropriate radio frequencies involves a variety of factors that depend on the specific needs of each applicant and the complex environmental conditions in which the station will be operating. In most cases, this task is performed by frequency coordinating committees ("coordinators"). These coordinators play a pivotal role in helping the Commission develop and manage private land mobile frequencies. Their involvement is especially important at a time when the demand for private land mobile radio systems is growing rapidly and the Commission's manpower resources are shrinking. Poor frequency recommendations, if relied on by the Commission, undermine efficient use of the radio spectrum, contrary to our statutory mandate to "... make available to all the people of the United States a rapid, efficient ... radio communication service." 47 U.S.C. § 151. Conversely, enlightened frequency recommendations help to ensure that the Commission optimizes the use of the available spectrum for the benefit of all members of the public. In this proceeding, we have comprehensively examined all facets of the frequency coordination process in an effort to maximize service to the public by assuring that the assignment and management of the private land mobile spectrum is performed in an efficient and effective manner.

A. History of Coordination

3. As a general rule, spectrum is shared in the private land mobile radio services. Even in the 470-512 MHz and 800 MHz bands, where there are provisions for exclusive channel assignments within specified geographical areas, there is an overall requirement that channels must be shared in order to accommodate the extraordinary growth in the use of land mobile communications systems. Before 1958, the private land mobile radio rules contained few specific procedures for frequency coordination by applicants. They did provide, however, that frequencies were available only on a shared basis. They also required applicants and licensees to cooperate in the selection and use of these frequencies to minimize interference. To facilitate this process, interested parties formed frequency recommendation committees. These committees were generally representative of the entities using the services. Consequently, for the most part, applicants could be assured that, in selecting a frequency for their use, the

committees would be both knowledgeable and impartial.

4. In 1958, we amended our rules specifically to recognize coordinating committees.[1] The rules provided that applicants could obtain frequency recommendations from these committees and that coordinator recommendations would be given consideration in our frequency assignment decisions.

5. In 1969, we enunciated the following general principles regarding frequency coordinating committees:[2]

a. a frequency coordinating committee must be representative of all eligibles in the radio service the committee purports to serve;

b. its recommendation is advisory, and not binding on either the applicant or the Commission;

c. the Commission has the power to remedy discrimination or other abuses by coordinating committees;

d. there is no bar to recognition of an alternative coordinating committee if it is more representative of eligible licensees;

e. any fee charged by coordinators can only represent the cost of providing the service;

f. coordinators cannot discriminate between members and non-members in providing service; and

g. All requests for coordination must be honored.

These principles have governed all frequency coordinating committees since that time.

6. Since 1958, private land mobile radio applicants have had two options in selecting frequencies. The first is for the applicant to select its own frequency. If this option is chosen, the applicant must submit a report based upon a field study that shows probable interference to all stations operating on the frequency within a set distance, and a statement that the licensees of these co-channel stations have been notified of the proposed operation.[3] The second option is to have a recognized frequency coordinator

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[1] *In the Matter of Amendment of Part 11, Rules Governing the Industrial Radio Services, To Delete, Modify and Create Services and To Effect Changes in the Availability of Frequencies, First Report and Order*, Docket No. 11991, FCC 58-602, 23 Fed. Reg. 4784 (June 28, 1958).

[2] *Frequency Coordination in the Industrial Radio Services*, 16 FCC 2d 305, 306 (1969).

[3] If proposing operation in the 150-170 MHz band, the field study must also take into account stations operating on frequencies 17.5 kHz removed. The only exception is for narrowband assignments proposing to operate more than 5 kHz removed from other narrowband assignments.

select the frequency, based on its experience and familiarity with local operating parameters.[4]

7. The current approach has created a number of problems for the Commission and coordinators. First, since there are no defined standards for field studies, the quality of field studies varies widely. Some appear to be virtually arbitrary frequency choices. Further, the notification requirements are sometimes abused or even ignored. In many cases, the Commission has had to send numerous letters requesting further information from applicants. This creates delays in application processing and greater workload for the Commission.

8. Another problem created by field studies is that they introduce an element of uncertainty into the frequency assignment process. Under present procedures, when an application is received by the Commission it is placed in the processing line. Anywhere from 25 to 30 days may elapse before the application is examined. Then, if it is accompanied by a field study, an FCC Form 1049B (Frequency Advisory Committee Form) is completed and mailed to the appropriate coordinator. This allows the coordinator to update its data base to reflect this frequency request and to provide comments to the Commission on the proposal. In the 30 to 35 days between the time we receive an application and the time we send a Form 1049B to a coordinator, the coordinator may recommend the same frequency to another applicant, unaware that there is an application already in the processing line requesting the frequency. This, in turn, either leads to applications having to be recoordinated and additional delays for the parties concerned, or results in the new user operating on a frequency which may not be the most appropriate. In either event, all parties concerned suffer.

9. A third major problem in the current coordination process occurs when a multiple licensed facility seeks to convert to a private carrier operation.[5] This type of system conversion has raised numerous problems for coordinators and the Commission because the new applicant may or may not be acting in conjunction with other licensees on the frequency. It is often not clear whether the new applicant is to be substituted for the previous licensees on the frequency or whether the new appli-

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[4] See Section 90.175 of the Commission's rules. 47 C.F.R. § 90.175 (1984).

[5] A multiple licensed facility is a shared facility for which each user is licensed for the base station as well as its own mobile units and control stations. A private carrier is a licensee who is authorized to provided communications service to Part 90 eligibles on a commercial basis. See Section 90.7. 47 C.F.R. § 90.7 (1984).

cant's requested mobiles and control stations are in addition to those already licensed on the frequency. If the new applicant is being substituted for previous licensees, all mobiles and control stations for the prior licensees would have to be purged from the data base. Otherwise, existing mobiles and control stations are retained in the data base. The confusion engendered has impaired the coordinators' ability to make sound frequency recommendations.

10. The fact that coordination is not currently required in the Special Emergency Radio Service, and in the Business Radio Service spectrum below 450 MHz, also has led to spectrum inefficiencies. For example, without a certified coordinator, many applicants cannot afford engineering assistance to identify the most appropriate frequency and may simply select a frequency at random. This can needlessly add to the frequency congestion problem. Further, lack of coordination has made it impossible for us to authorize narrowband operations on a primary basis in these two services.[6] In certain cases, the level of adjacent channel interference protection provided by the frequency separation between adjacent narrowband and FM assignments is not sufficient to permit same area operation. As a result, a geographic separation is needed to prevent degradation of communications quality. Since there is no coordinator, narrowband operations in the Special Emergency Radio Service and Business Radio Service below 450 MHz are authorized only on a secondary (non-interference) developmental basis.

B. History of this Proceeding

11. In 1982, Congress amended the Communications Act to recognize the role frequency coordinators play in the spectrum management process.[7] Among other things, Congress affirmed that we have the authority to use frequency coordinating committees. 47 U.S.C. 332(b)(1). It also recognized the value of the assistance provided by these committees. The Conference Report accompanying this legislation noted:

> . . . frequency coordinating committees not only provide for more efficient use of the congested land mobile spectrum, but also enable all users, large and small, to obtain the coordination necessary to place their stations on

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[6] Narrowband operations were authorized in the *Report and Order*, Docket 84-279, 50 Fed. Reg. 13596 (April 5, 1985).

[7] "The Communications Amendments Act of 1982," P.L. 97-259, 96 Stat. 1087, September 13, 1982. Section 331 of the Communications Act of 1934, as amended, is codified at 47 U.S.C. § 332.

> the air. Without such frequency coordinating activity, some of these applicants would not be able to afford the engineering required in the application process. Thus, by essentially equalizing the frequency selection process for all applicants, the applicants are placed on a competitive parity, with no one applicant operating on a better or more commercially advantageous frequency than his or her competitor. The Conferees note that this pro-competitive aspect of frequency coordination is of particular importance to small business operators.
>
> To further promote fairness in frequency allocation, the Conferees encourage the Commission to recognize those frequency coordinating committees for any given service which are most representative of the users of that service. The Conferees also encourage the Commission to develop rules or procedures for monitoring the performance of coordinating committees.[8]

12. In response to this congressional directive and to address the problems outlined above, we commenced a *Notice of Inquiry* (*NOI*) on July 14, 1983, to examine the private land mobile radio frequency coordination procedures.[9] Underlying this *NOI* was our desire to improve the processing in and spectrum management of the private land mobile radio services in order to speed licensing of facilities that are vital for the efficient and effective operation of our nation's businesses, utilities, health care providers and state and local governmental entities. The *NOI* solicited comments on the following issues:

a. What should the functions of frequency coordinating committees be?

b. What authority should frequency coordinating committees have?

c. Should there be one exclusive or multiple frequency coordinating committees per radio service?

d. What oversight of frequency coordinating committees should there be by the Commission?

e. Is the field study option of frequency coordination effective and should it be retained?

13. Based on the record developed in response to these areas of inquiry, on October 17, 1984, we adopted a *Notice of Proposed Rule Making* (*Notice*) in this proceeding.[10] In the *Notice*, we highlighted problems inherent in the existing frequency coordination process. To alleviate these problems, we proposed new rules and policies designed to: (1) improve the quality of frequency

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[8] Conference Report No. 97-765, 97th Cong. 2nd Sess., August 19, 1982, at 53, reprinted in 1982 U.S. Code Cong. & Ad. News 2237.

[9] *Notice of Inquiry*, PR Docket No. 83-737, 48 Fed. Reg. 35149 (August 3, 1983).

[10] *Notice of Proposed Rule Making*, PR Docket No. 83-737, 49 Fed. Reg. 45454 (November 16, 1984).

selections; (2) minimize processing delays; (3) encourage interservice frequency sharing; and (4) facilitate the introduction of new technologies. We noted that an accurate and up-to-date private land mobile data base is fundamental to achieving these objectives. Without accurate and current information, a coordinator cannot make sound frequency recommendations to applicants, and the Commission loses its ability to review frequency recommendations effectively before licensing. We also proposed to certify one coordinator for each private land mobile radio service or pool of frequencies at the conclusion of this proceeding. Accordingly, we asked organizations interested in being the certified coordinator in a particular service to file their requests as comments in this proceeding.[11]

14. Under the approach proposed in the *Notice*, applicants proposing new stations or modifying existing licenses would send their completed applications to the recognized coordinator in the service in which they are applying. The coordinator would check the application for completeness, accuracy, and compliance with the Commission's rules. The coordinator would then identify the most suitable frequency; this frequency would be either that chosen by the applicant or the coordinator. If an error was detected or the coordinator did not agree with the system parameters proposed, the application would be returned to the applicant. The applicant could then submit a technical showing to support its choice of frequencies or other parameters in question. Once the coordinator was satisfied that the application is in order and that the proposed operation would result in the least amount of interference to existing users, the application would be forwarded to the Commission. If the applicant cannot convince the coordinator that its proposed operation is acceptable, the case would be submitted to the Commission for resolution.

Discussion

15. Based on our analysis of 185 comments and replies submitted in this proceeding, we are adopting the package of proposals contained in the *Notice*, with some modifications. The central issue before us is what role frequency coordinators should play in the private land mobile services. This issue has a number of facets which, while interrelated, we consider separately below for ease of exposition. The decisions made with regard to each issue are extremely sensitive to many of the decisional elements in other

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[11] A list of all parties filing comments and replies is contained in Appendix A.

issues. The totality of these decisions forms the basis for improving the efficiency, effectiveness and simplicity of the process of applying for and obtaining authorizations to use the spectrum allocated to the private land mobile radio services. We believe that the approach in this *Report and Order* will help expedite service to businesses, utilities, health care providers, and state and local governmental entities needing mobile radio authorizations while mitigating the demand for Commission resources posed by the increasingly complex and growing number of land mobile radio applications.

A. Responsibilities of Coordinators

16. The *Notice* proposed that certified coordinators would, in addition to providing frequency coordination on a non-discriminatory basis for the particular radio service for which they are certified, also be responsible for: checking the application package to see that it is complete, that all entries are correct, and that the proposed operation is in compliance with the Commission's rules; filing the application and handling returns; facilitating the introduction of new technologies; handling post-licensing conflicts; and handling interservice sharing requests.

17. In response to these proposals, we received extensive comments from a broad range of parties, including users, trade associations, manufacturers, and frequency coordinators. Some of these comments proposed additional or modified coordination responsibilities. In the discussion that follows, we will review these comments, together with our conclusions on each issue addressed.

(1) Non-Discriminatory Service

18. Consistent with the principles that have applied to coordinators since 1958, we will continue to expect coordinators not to discriminate among users and to honor all requests for coordination. Although coordinators are generally representative of users in their service, some may have direct affiliation with a class of users through trade associations and the like. Such relationships must not affect the manner in which coordinators perform their services; also the treatment of all applicants must be similar and without discrimination, including charges for services rendered. Individual applicants need assurance that when coordinators provide a recommendation, it is done with total impartiality. Since representativeness is a primary consideration and criterion in our selection of frequency coordinators, providing non-discriminatory

service is not only basic but essential to the success of the coordination process.

(2) Application Review and Handling

19. (a) *Application review* — The proposal that coordinating committees be responsible for assuring that all data entries on applications are correct generated many different opinions concerning the extent to which coordinators should be involved in the application review process. Forest Industries Telecommunications (FIT) and the Special Industrial Radio Service Association (SIRSA) supported the Commission's proposal to have coordinators review the applications, arguing that the coordinators are in the best position to do so. SIRSA indicated that it already performs this function in handling coordination requests. FIT stated:

> FIT also agrees with the Commission's proposal to require that all applications requiring coordination be first submitted with the coordinator for initial review. FIT has had long experience in aiding forest products applicants and, based on its experience, agrees that the procedure proposed by the Commission is appropriate and will result in improved and faster licensing of land mobile radio facilities. (FIT's comments, page 4)

Others, like the Central Station Electrical Protection Association (CSEPA) and the International Taxicab Association (ITA), contended that coordinators should review only those items within the coordinator's area of expertise. Beyond that, these commenters argued, the coordinator should assume the applicant's information is correct. The National Association of Business and Educational Radio (NABER), the Central Committee on Telecommunications of the American Petroleum Institute (API), and the Association of American Railroads (AAR), while stating that they were willing to undertake this additional task, questioned whether it is proper for coordinators to review certain matters associated with the application review process. AAR's comments were typical:

> . . . AAR questions whether it is necessary or proper for coordinators to pass on such matters as statutory qualifications of an applicant, eligibility, permissible usage, ownership changes, compliance of a proposal with the Commission's Rules, or to pass on a request for waiver of the Commission's Rules. (AAR's comments, page 8)

Still others, like Motorola Inc. (Motorola) and Professional Licensing and Liaison Services (PLLS), strongly objected to enlarging the coordinators' role in the license application process. In its reply comments, however, Motorola argued that coordinators should be responsible for screening the technical portion of the application form. Finally, the International Association of Fire Chiefs and the International Municipal Signal Association (IMSA/IAFC) and the Associated Public Safety Communications Officers, Inc. (APCO) expressed concern with the proposal to enlarge coordinator functions on the ground that recent budgetary cuts imposed on local government agencies would make it hard for public safety organizations to assume new duties.

20. The balancing of interests here is a difficult matter. On the one hand, the guidelines accompanying the 1982 Communications Amendments Act encourage us to improve the quality of recommendations and to minimize processing delays.[12] Ensuring that applications filed with the Commission are complete and in general compliance with the applicable rules will promote those goals. On the other hand, we do not want to overburden coordinator resources and capabilities, particularly by having them review data elements that are not essential to frequency coordination. After careful consideration, we agree with the comments of NABER that coordinators should not have to review the entire application but should be responsible for reviewing those matters pertaining to the top portion of the current Form 574. Thus, we will require coordinators to assure that applications are complete and that data items 1-25 on the Form 574 application are correct. Coordinators must already review all the technical data items as a matter of course in handling each coordination request. Checking to see if the application is complete and reviewing additional data items like station address and control point information should not prove to be a significant burden. As indicated by NABER in its reply comments, this is the portion of the application that is essential to proper frequency coordination. Further, NABER stated:

> The top portion of the form relates to information regarding the frequencies to be licensed. . . . This process should ensure that the major source of current returns of applications by the FCC's Gettysburg, Pennsylvania Licensing Bureau, such as obvious typographical and similar errors, will be substantially reduced. (NABER reply comments, pages 4-5)

Coordinators will not be required to make a final determination on eligibility, permissible usage, or whether the use of a particular communication facility is in the public interest. The *Notice* proposed that an application with a request for waiver of the rules would be submitted to the coordinator who would concur or disagree with the waiver request when it filed the application with the Commission. We have reconsidered this proposal and will not require coordinators to act on waiver requests. Coordinators are free, however, to make comments on these issues and to include them in the application package filed with the Commission. We will continue to review each application and to make all necessary public interest judgments.

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[12] Conference Report, *supra*, footnote 8.

21. (b) *Processing order* — The *Notice* proposed to require coordinators to process applications in order of receipt. This has not been a formal requirement in the past, but we believe that most coordinators do attempt to act on coordination requests sequentially. In fact, many candidate coordinators indicated in their comments that they already process applications in the order they are received. While we would expect coordinators to continue to process applications in order of receipt without a requirement to do so, we believe a requirement is appropriate and necessary in fairness to all applicants. We recognize, however, that processing in order of receipt does not necessarily lead to coordinator actions or disposals in that same order. Some coordinations are more complicated than others and therefore require greater time to complete. We believe that the requirement that coordinators process applications sequentially, together with the speed-of-service standard discussed in paragraphs 27 and 28 will enhance the orderliness, timeliness, efficiency and fairness of the coordination process. This requirement will apply equally to in-service and inter-service requests. That is, in terms of processing, a coordinator must handle an inter-service request as it would a request from an eligible in the service in which the coordinator is certified.

22. (c) *Application filing* — We received a number of comments on the proposal that coordinators be responsible for filing applications. FIT supported the proposal, stating that such a procedure would result in improved and faster licensing. Motorola, the Forestry Conservation Communications Association (FCCA), and the American Association of State Highway and Transportation Officials, Inc. (AASHTO), also endorsed the idea of having coordinators file applications. However, most of those interested in being certified coordinators opposed a mandatory filing requirement. These parties took the position that if the applicant wishes to see its application before it is filed with the Commission, the applicant should be allowed to do so and to forward it on its own to the Commission. For example, the Telephone Maintenance Frequency Advisory Committee (TELFAC) stated:

> Although TELFAC is prepared to direct all FCC Form 547s with appropriate evidence of frequency coordination to the FCC, it submits that applicants should be provided with an opportunity to file applications directly with the Commission, with evidence of coordination, if they wish. The type of accuracy that the Commission will apparently require of coordinators will necessitate communication between TELFAC staff and the applicants to resolve discrepancies in applications. Accordingly, applicants may wish to certify the accuracy of the data contained in the application before it is actually provided to the Commission. (TELFAC comments, page 7)

The Utilities Telecommunications Council (UTC) comments were also typical:

> However, UTC strongly feels that if the applicant wishes to see his filing before it is submitted to the FCC that the applicant should be allowed to do so and to forward it, on his own, to the Commission. (UTC comments, page 13)

23. We proposed having coordinators rather than applicants file applications with the Commission for two reasons: to minimize defective applications and to reduce the overall time involved in licensing. If we allow applicants to file applications after the coordinators' review, applicants would be able to alter their applications in some way. As a result, we could not hold coordinators responsible for the information provided in applications. Further, allowing applications to be returned to applicants before they are filed with the Commission introduces an additional step and additional time in the licensing process. We are unpersuaded that this added delay and uncertainty are warranted by any counterveiling benefits. If an applicant wants to see what the coordinator files with the Commission, it may request a copy of the Form 574 along with a copy of the coordination document.[13] We believe that having coordinators file applications is both appropriate and consistent with our goals of improving the quality of frequency recommendations and expediting the licensing process.

24. (d) *Application returns* — Only a few commenters addressed our proposal to have coordinators handle application returns. Those that did were against having coordinators perform this function. For example, CSEPA maintained:

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[13] Motorola in its reply comments suggested that the yellow copy of the Form 574 be used for this purpose. NABER stated that it presently uses the yellow copy, supplemented by an abbreviated NABER form, as the application for coordination.

> The frequency coordinator needs to know when an application has been granted but has no need to know when or why an application has been returned by the Commission. Accordingly, returning defective applications to the frequency coordinator can have no effect but delay responses to returned applications by the applicant. (CSEPA comments, page 13)

The American Automobile Association (AAA) and E. F. Johnson agreed with CSEPA. SIRSA argued that additional costs will be incurred by coordinators if they are required to handle all applications returned by the Commission. We are persuaded by the comments that requiring coordinators to handle application returns would introduce a delay in the licensing process and additional costs for applicants without any significant benefit. Accordingly, the Commission will return all defective applications directly to the applicant or, if requested, to the applicant's representative. Such applications, when ready for re-submission, must be routed through the appropriate coordinator if they involve any changes in data items 1–25. This will ensure that the coordinator is made aware of any changes that have been made in the system's technical parameters.

25. (e) *Post-licensing conflicts* — The proposal that coordinators be required to participate in resolving post-licensing conflicts also proved to be controversial. API, FIT, and APCO supported the proposal. Typical of these comments were those of API, which stated:

> The Central Committee supports the Commission's proposal to require the participation of coordinating committees in post-licensing conflict resolution. The Central Committee's PFCC (Petroleum Frequency Coordinating Committee) has traditionally aided licensees in the attempted elimination of interference between stations. Because coordinating committees will presumably retain the most accurate information available concerning the use of adjacent and co-channel assignments for each licensee, they will be uniquely equipped to aid licensees in resolving interference between stations. (API comments, page 27)

Most of the comments addressing this subject, however, were not in favor of the Commission's proposal. NABER, AASHTO, SIRSA, and the Manufacturers Radio Frequency Advisory Committee (MRFAC) agreed that it is important for the coordinator to be involved in post-licensing conflicts, but they argued that such involvement should be on an informal basis and not mandated. In this regard AASHTO stated that:

> AASHTO believes that the coordinator should not be involved in post licensing conflicts *beyond an advisory capacity*. The Commission rightly intends to retain final licensing authority, and with that it should also have the responsibility. (AASHTO comments, page 12, emphasis in original)

NABER stated:

> NABER has previously been involved in many post-licensing conflicts, and desires to continue its involvement. However, NABER has done this in the past only on an advisory and informal basis. The resources required to formally resolve post-licensing conflicts would be sizeable. In addition, the coordinator might be forced to assume responsibility for success of the applicant's enterprise and thereby expose the coordinator to greater potential liability. (NABER comments, page 30)

26. We have carefully considered the views expressed by commenting parties. Even though most of the comments argue against requiring coordinator participation in post-licensing conflicts, several reasons persuade us to require coordinators to help resolve post-licensing conflicts stemming from frequency selections and recommendations. First, the coordinator, with its specific knowledge of user requirements and local conditions, is in the best position to resolve such problems. Second, we believe that the coordinator should be made aware of such post-licensing problems as soon as possible since knowledge of these problems could affect pending or future coordination requests. Finally, as an organization representative of the affected licensees, the coordinator is uniquely qualified to provide objective and informed assistance regarding post-licensing problems. It is not unreasonable for coordinators, who will be providing a service for a fee, to have some responsibility to help resolve problems related to their recommendations. Accordingly, a licensee's first point of contact for post-licensing problems involving frequency selection will be the coordinator. We will become involved only if the coordinator and the affected parties cannot agree to a solution. We continue to retain final responsibility in this area.

27. (f) *Speed-of-service* — The *Notice* proposed that coordinators handle coordination requests within a reasonable time frame. A specific standard for speed-of-service was not proposed. All of the entities seeking recognition as coordinators stated that they intended to respond as quickly as possible to coordination requests. While most of the parties indicated that 90 per cent of the coordination requests would be disposed of within 14 to 25 days, they argued that the Commission should not set a specific speed-of-service requirement. Others, such as PLLS, contended that a turn-around time requirement is long overdue. According to PLLS, it is not uncommon in some services to wait several months for a freqency coordination. Teletech, Inc. (Teletech) also supported a speed-of-service requirement if the Commission adopted its proposal to certify one coordinator per service.

28. We believe that a speed-of-service requirement would serve the public interest. We realize the time required to recommend a frequency may vary substantially depending on workload at the time and the specific system proposed. However, we believe, based on the comments, that 20 work days is a reasonable time frame to handle most of the coordination requests. Accordingly, we expect that the speed-of-service for 90 per cent of the coordination requests not exceed 20 work days. In addition, we believe interservice sharing requests warrant the same expeditious handling as in-service requests. Therefore, the same speed-of-service requirement will apply, i.e. 90 per cent of all interservice sharing requests should be handled within 20 working days. Separate speed-of-service records must be maintained for these two types of requests and in such a way so as to demonstrate compliance in the event a question arises.[14]

(3) Frequency Selection

29. (a) *Coordinator discretion* — Currently, coordinators are required to recommend a frequency that will result in the least amount of interference to all existing stations operating in a particular area. If an applicant requests a specific frequency or band, we have applied this "least interference" rule only to frequencies in that band and have not required coordinators to consider frequencies in other, less congested bands. In the *Notice*, we proposed to allow, but not to require, coordinators to honor requests for a specific band if a frequency in a different band is superior from the standpoint of spectrum efficiency or is more appropriate for other reasons.

30. The comments from those parties interested in being certified coordinators supported this proposal. They stated that only under such an approach could a coordinator recommend the optimum frequency. Typical of the commenters supporting this proposal was APCO, which stated:

> APCO plans to consider the applicant's preferred frequency or select a frequency if no preference is expressed. Frequencies will also be considered in light of state or regional plans which are on file with the Commission.

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[14] For in-service requests the time frame is measured from the time the request is first received by the coordinator (national or local) until a recommendation is mailed to the Commission. Likewise, for interservice sharing requests, the time frame is measured from the time the out-of-service coordinator receives the request to the time that coordinator sends its recommendation to the originating coordinator. The amount of time the out-of-service coordinator takes to complete its coordination is not included in the speed-of-service of the in-service coordinator.

> Many local area coordinators presently follow these practices, and many hours are often spent searching and researching records for usable frequencies. The proposed centralized data base, containing records of all public safety frequencies nationwide, will greatly facilitate this process. APCO totally concurs with the latitude proposed by the Commission in allowing the coordinator to recommend alternate portions of the spectrum as necessary. (APCO comments, page 18)

PLLS opposed the proposal, however, arguing that permitting coordinators to examine frequency bands other than those requested by an applicant would be tantamount to allowing coordinators to determine system design.

31. We have considered this matter in light of the comments and do not find the position advanced by PLLS a persuasive reason for altering our proposal. Although we are giving coordinators greater discretion in choosing frequencies, we believe coordinators need this flexibility to maximize the use of the spectrum. Allowing a coordinator to recommend the most appropriate band within its service will result in more orderly assignment of applicants on the available channels than is now possible; reduce the impact of new systems on existing users; and produce more balanced occupancy of private land mobile channels. Adding an additional user to an already congested environment serves neither the new user nor existing users. Contrary to the position taken by PLLS, we do not believe coordinators will become system designers if they are given this flexibility. Coordinators represent the end users and, therefore, will try to satisfy requests from their constituency for a specific band whenever possible. We recognize applicants often request a frequency in a particular band to maintain system compatibility or to communicate with another licensee. In these cases, while the frequency requested may not always be the one that will result in the least amount of interference, it may be most appropriate under the circumstances. We are confident that coordinators will give these factors appropriate consideration.

32. (b) *Assignment methodology* — In the *Notice* we stated that there are too many variables that can affect the coordination process for us to develop a rigid, mandatory assignment methodology. We proposed to allow each coordinator to develop and use its own specific frequency selection methodology. All parties commenting on this issue, except one, supported this approach. Teletech took the position that coordinators could not make compatible frequency recommendations without common standards. This position, however, was premised on the Commission finding that coordination competition, or multiple coordinators, in

a service is feasible. Teletech, while not proposing that the Commission prescribe any particular methodology, stated that the Commission should "certify that one coordinator has developed a suitable methodology, and then require competitive coordinators to follow that methodology if they wish to compete in that service." (Teletech comments, page 6) In view of our decision regarding one coordinator per service and the overwhelming support from the commenters on our proposal regarding the coordination methodology, we are leaving the frequency selection methodology up to the individual coordinators.

(4) Interservice Sharing

33. (a) *Interservice sharing requests* — Interservice sharing of private land mobile frequencies is an indispensable element in the Commission's overall program for ensuring efficient use of the limited spectrum. Under the interservice sharing provisions embodied in Section 90.176 of the rules, entities eligible to use frequencies allocated for one radio service or frequency group may use frequencies allocated for a different radio service or frequency group when they can show that there are no satisfactory frequencies in their own radio service. In the *Notice*, we proposed to make coordinators responsible for handling all interservice sharing requests.

34. All comments received on this issue supported the proposal that coordinators be responsible for handling interservice sharing requests. Therefore, we have decided to adopt that requirement. One of the goals of this proceeding is to increase private land mobile spectrum efficiency. Providing frequency coordination for in-service frequencies will go a long way toward accomplishing this goal. In order to maximize private land mobile spectrum efficiency, we must also take advantage of interservice sharing possibilities.[15] We believe, as with in-service frequencies, coordinators are in the best position to handle such requests. Therefore, we are requiring coordinators to be responsible for submitting to the appropriate coordinator interservice sharing requests from entities in the service or category they represent and responding to requests from other certified coordinators. However, we expect a coordinator to make an extensive search of the in-service frequencies prior to making an interservice sharing request.

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[15] By *Report and Order* in Docket No. 81-110, released November 5, 1981, 46 Fed. Reg. 55701 (November 12, 1981) the Commission adopted rules governing interservice sharing of frequencies below 470 MHz.

Unjustified, frequent interservice sharing requests will not be acceptable.

35. (b) *Interservice sharing request denials* — Another problem with interservice sharing that has come to our attention is that some coordinators deny interservice sharing requests without explanation. By providing the reasons for denying a request, the coordinator requesting the sharing will get an insight into how other coordinators select frequencies. This knowledge should save both coordinators time and effort in future interservice sharing requests. While summary denials of sharing requests are the exception rather than the rule, to promote sharing to the maximum extent, we take this opportunity to adopt a requirement that coordinators provide supporting reasons with any denial of an interservice sharing request.

(5) Electronic Mail Box

36. Coordinators have indicated that interservice sharing concurrences are obtained by exchanging documents through the mail. In the *Notice*, we stated that if coordinators could access each others' pending frequency selections in some fashion interservice sharing could be expedited. Comments on this issue were specifically requested. Several parties, like AAA, CSEPA, and FCCA argued that there is no need to change the present procedures in light of the small number of interservice sharing requests processed. Others, like the American Trucking Association (ATA), expressed concern about the security of the data. FIT and API suggested that coordinators be required to have the capability to transmit interservice coordination requests via an "electric mail box" This suggestion was supported by a number of parties filing reply comments. For example, NABER in its reply comments stated:

> NABER supports the electronic mail concept as advanced by the commenting parties. In addition to other conveniences, an electronic mail system would also provide coordinators with a record of interservice sharing requests. As most of these same coordinators must have direct access to the Commission's data base, and thus have the capacity for wire transfer of electronic data, the additional provision of electronic mail capacity should not prove burdensome. (NABER reply comments, page 12)

The Telephone Companies also suggested that pending frequency recommendations be transmitted by electronic mail.

37. We agree that the electronic mail box concept has merit. Interservice sharing contributes significantly to more efficient use of the spectrum and, therefore, such requests should be handled

as quickly as possible. Accordingly, we are recommending, but not requiring, that each coordinator establish an electronic mail box to transmit interservice sharing requests and to receive replies.[16] Not only will the electronic mail concept improve the speed and quality of recommendations, it will also encourage and facilitate the cooperation between coordinators that is so important to the success of the coordination process. We will leave to the coordinators the details of establishing the electronic mail system. We expect that coordinators will confer to determine the specifics of the system and ensure compatibility and interoperability. Coordinators are in the best position to determine how to accomplish this, bearing in mind the standards governing speed of service.

(6) *Commission's Data Base*

38. In order to make the best possible frequency selection, coordinators must have complete, accurate and current knowledge of the radio environment in which a proposed system will operate. In the *Notice*, we proposed to require all coordinators to be able to access the Commission's data base and to make frequency recommendations based on that data. It was our belief that this system would provide for a commonality of data at low cost.

39. Most commenters that addressed this subject supported the proposal that coordinators be able to access the Commission's data base. Only AAA stated that it had no need to access the Commission's data base, while stating that it would comply with whatever the Commission required. Since effective coordination relies on Commission-generated information, we believe requiring coordinators to have such a capacity is consistent with our objective of maximizing spectrum efficiency. Accordingly, we will require each coordinator to be able to access the Commission data base once our system becomes available through a third party contractor.

40. ATA, API, SIRSA, NABER, and others opposed the proposed requirement that a coordinator's recommendation be based on the Commission's data. In general, these parties argued that the Commission's data base does not include all assignment and usage criteria used by coordinators in making frequency selections. SIRSA, in comments typical of those entities holding this view, stated:

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[16] The extent to which each coordinator implements such a system may depend on such factors as the coordinator's size, the number of coordinations handled per year, and its involvement to interservice sharing.

> We only wish to access the FCC's data base for certain research purposes. SIRSA's data base is structured and maintained in a "management information system" method designed to meet the needs of the Special Industrial Radio Service Association, Inc. Our overall data needs for coordination purposes are therefore broader and different than the needs of the Commission and other coordinating committees. For example, we wish to know the commercial activity of each licensee, and the FCC does not carry that designation in its data base. Our recommendations take into account the type of users already employing a channel before it is recommended to a new applicant. Additionally, our data base includes information concerning all "pending" applications, while the Commission's data base is void of that detail. (SIRSA comments, page 20)

In a similar vein, ATA stated:

> ATA would prefer to continue to reply primarily on its own data base for the following reasons. First, ATA has maintained its own reliable records for many years and has developed a system which meets its needs. Second, ATA's own data base can include important coordination data which is not required for the Commission's data base. Accordingly, for its activities, ATA's data base may be more complete and useful than the Commission's. Third, an additional requirement for use of the Commission's data base will almost certainly add to fees which applicants will have to pay for frequency coordination. The final form of and mode of access to be provided to the Commission's data base will have a pronounced effect on changes which will have to be made for ATA's frequency coordination service. Accordingly, although ATA will comply fully with the Commission's requirements for data base use, ATA would prefer to be able to continue to rely on its own data base, which well serves its needs. (ATA comments, page 6)

41. After further analysis of this matter, we are persuaded by the arguments against requiring coordinators to use the Commission's data base in making their recommendations. Requiring coordinators to use a single data base which may not include all pertinent information needed (e.g., commercial activity, tone codes, radiation patterns) to discharge their coordination responsibility would be contrary to our purpose in this proceeding. We will leave coordinators free to establish their own enhanced data base, which they may utilize to accomplish their coordination function. Accordingly, we are permitting coordinators to select the data base upon which to make frequency selections. However, in the case of inconsistencies or discrepancies, the Commission's data base will govern and will be used to resolve any disputes.

(7) *Fees*

42. The *Notice* also invited comment on whether the Commission should regulate the fees charged by coordinators or impose restraints on profitability or the use of profits. We proposed only

to require that coordinators establish standard charges reflecting the cost of providing various services, that the charges be uniformly applied to all applicants, and that the method of arriving at the charges be made available for public inspection.

43. The issue of the appropriate degree of regulatory oversight regarding fees charged for frequency coordination generated a number of comments with varying points of view. Most of the comments filed by entities applying for certification contended that without knowing precisely the final outcome of this proceeding they could not accurately project costs with any certainty. For example, NABER, FCCA, SIRSA, UTC, and AASHTO stated that any fees would be based on recovering the costs of providing service. NABER argued that the Commission should not get involved in regulating or approving the specific fees charged by coordinators. NABER stated:

> NABER is in agreement with the Commission's proposal to refrain from incorporating a set coordination fee schedule into the Commission's rules. The proposed requirement that the coordinators establish standard charges reflecting that cost of providing various services on a non-profit basis, and that these charges be uniformly applied to all would be applicants, represent sufficient oversight on the part of the Commission. (NABER comments, page 30)

AAR also stated that formal standards for fees are not needed. It contended that because coordinators are representative of users, self-regulation will be both feasible and effective. In fact, no comments were submitted which supported our mandating specific fee schedules.

44. In contrast, entities not currently involved in the frequency coordination process generally stressed the need for the Commission to establish adequate safeguards to ensure that coordination fees reasonably reflect the cost of providing the service. For example, the National Mobile Radio Association (NMRA) was concerned about fee abuses that could occur under the single coordinator approach proposed. NMRA cited as an example a coordinator including lobbying costs in a very high coordination fee. It had no objection, however, to coordinator fees including reasonable costs for filing petitions and comments to a proceeding provided such filings directly affect users in the radio service the coordinator represents. This NMRA position was supported in reply comments from NABER. Teletech also expressed concern over fees. It stated that if the Commission adopted its proposal to designate a single coordinator for each of the private land mobile radio services, it would be necessary to "establish pervasive,

on-going regulation to ensure that the monopoly coordinators provide non-discriminatory, quality service at a cost-based price." In addition, the National Ski Patrol System commented that frequency coordination for tax-exempt entities such as volunteer fire departments should be provided on a non-profit basis. NMRA also commented that coordinators should file annual reports demonstrating the relationship between costs and fees. SIRSA, in contrast, opposed any requirement that coordinators make their records available to the public as a matter of course.

45. We have carefully weighed the various arguments raised by the comments addressing the fees issue, and have reached the following conclusions. First, there is no support in the comments nor does there appear to be any compelling public interest reason to establish a fixed schedule of coordination fees. Therefore, we will neither mandate nor review specific frequency coordination fees on a regular basis. Second, if necessary, the coordination fees of each coordinator will be reviewed by the Commission only to ensure that they reasonably reflect the cost of providing the overall coordination service. Coordination service includes filing petitions, comments, and reply comments in Commission proceedings that may affect other users in the radio service the coordinator represents. Coordinators, however, will not be required to provide services on a non-profit basis. Third, we will not require coordinators to make their income and expense records generally available for public inspection as proposed in the *Notice* and by some commenters. We are persuaded by the comments that this requirement could be very disruptive to the normal operations of the coordinator and that there is no compelling reason to require that this information be routinely made available either to the public or the Commission. We are confident that sufficient oversight of fees can be maintained by requiring that coordinators make pertinent income and expense records available to the Commission upon request. Complaints regarding coordination fees may be filed with us. If a coordinator abuses these standards on fees, we will move appropriately to replace that entity with some other coordinating body.

46. We believe this approach achieves an appropriate balancing of the various fee-related issues by providing coordinators the needed flexibility to allow for differences in the cost of coordinating frequencies in the various radio services involved, while addressing concerns about monopoly pricing.

(8) *Single Nationwide Point of Contact*

47. In the *Notice* we said that certified coordinators would be free to determine their organizational structure. Thus, for example, the coordinator's organization could be comprised of volunteers, a paid staff, or a combination of both. Further, coordination could be performed at a state level, a regional level, or a national level. The only structural requirement we proposed was that each radio service coordinator establish a single nationwide point of contact to deal with the Commission.

48. All of the entities requesting to be a coordinator except one supported this approach. The one comment in opposition was filed by Eastern States Public Safety Radio League (ESPRL). ESPRL proposed to provide coordination in the Police, Local Government, and Special Emergency Radio Services but only in serveral New England states.

49. We believe a single nationwide point of contact is critical to our objectives in this proceeding. Radio signals do not end at jurisdictional boundaries such as state or county lines. Therefore, in cases where the actual coordination is performed at a state or regional level it may be necessary for the person performing the coordination in one state or region to discuss the impact of the proposed operation with a counterpart in other states or regions. Requiring the certified coordinator to have a single, nationwide point of contact responsible for the final coordination product will help resolve any disputes that may develop in these cases. Further, it will significantly reduce the number of coordinators that the Commission must deal with for the exchange of the paperwork involved in the licensing process, thereby promoting a more efficient process. It will minimize licensing delays and assure that all coordinators have pertinent information necessary to perform their responsibilities. Finally, it will minimize the number of points of contact involved in interservice sharing requests. Accordingly, we are requiring each certified coordinator to establish a single point of contact with the Commission. This does not preclude coordinators from utilizing local coordinators in the actual coordination process, as long as all other requirements including timeliness, are met.

(9) *Facilitating New Technologies*

50. In the *Notice* we also proposed that coordinators facilitate the introduction of new technologies into the private land mobile radio services. All those interested in becoming certified coordina-

tors indicated their support for the development of new technologies that improve communications and increase spectrum efficiency. Some, however, advanced the position that coordinators should not be required to promote one technology over another. API, for example, stated:

> The Central Committee will be capable of recommending the employment of narrowband systems and will encourage its application wehre appropriate. However, it is not the responsibility of coordinating committees to actively promote the employment of narrowband equipment. Marketing of equipment is more appropriately the responsibility of equipment manufacturers, not coordinating committees. (API's reply comments, page ii)

FCC and AASHTO individually stated:

> At this time, there is nothing FCCA [AASHTO] can do specifically in the frequency coordination process to promote the use of spectrum efficient technologies. Economics is as much a part of a change to a new technology as is the technical issue, and public safety agencies cannot be in the lead in either area. At such time as the Commission develops a plan for implementation of such systems, FCCA [AASHTO] will participate fully. (FCCA comments, page 14; AASHTO comments, page 12)

APCO indicated that while it supports the development of technology for improving communications and providing more available channels, it "has repeatedly stated in other filings, it does not consider the public safety bands the appropriate place to experiment with new technologies." (APCO's comments, page 23)

51. In contrast to the above statements, several commenters, including parties seeking certification as coordinators, envisioned coordinators playing an active role regarding the use of new technologies in the private land mobile radio services. For example:

> . . . AAR, as it has done in the past, plans to encourage and to promote the development and use of spectrum efficient technologies in railroad land mobile communications as equipment and system designs become available and as we learn to incorporate those technologies into the current land mobile environment. (AAR comments, page 17)

> The introduction and use of new and/or alternative spectrum technologies is greatly influenced by professional frequency advisory committees who manage dynamic radio services. In fact, it is SIRSA's opinion that these committees must play an active role in the use of alternative technologies . . . By doing so, the frequency advisory committee permits their respective radio service to develop in an effective fashion over the course of time. (SIRSA comments, page 14)

SIRSA further stated:

> . . . new technologies that may be introduced within a radio service with a minimum interference impact should then be publicized to all new existing licensees. Finally, if a situation is encountered where a new licensee's intitial frequency and/or band request may not be accomodated due either to technical or existing co-channel use constraints, that applicant should be advised by its respective coordinator to consider alternative technologies. SIRSA has already adopted this philosophy. (SIRSA comments, page 15)

On this issue, Stephens Engineering Associates (Stephens) stated:

> Thus, given the Commisison's endorsement of narrowband technology, frequency coordinators should be more than neutral when their counsel is sought regarding the choice of the technology to be employed by a new user: The coordinators should affirmatively encourage the use of technology that will best advance the spectrum conservation goal. Indeed, in areas characterized by frequency congestion, the coordinators should establish a functional presumption to the effect that narrowband systems are the technology of choice, absent a persuasive demonstration from the proposed user of a need for a wideband system. (Stephens comments, pages 7–8)

52. From the above comments, it is clear that the parties do not oppose the introduction of new technologies. Rather, the concern raised is what role coordinators should play in promoting this objective. All agree that use of new technologies is vital to mobile radio users as they seek to initiate or expand their communications capabilities on increasingly scarce spectrum. Since coordinators will play a central role in frequency selection, they will be in an ideal position to see where new technologies can be employed to alleviate frequency congestion; to increase the utilization of the available spectrum; to improve service; or to accommodate an applicant that might otherwise not be able to obtain service. We believe that it is essential for coordinators to aid implementation of new technologies in the private land mobile radio services. Indeed, one of our major objectives in this proceeding was to devise methods to introduce new technologies in order to satisfy future land mobile communications requirements. We do not intend for coordinators to promote one technology over another or to require new technologies to be used. Rather, coordinators should be familiar with all new radio communication technologies, especially those that have spectrum efficiency benefits, and should consider such technologies when determining the most appropriate frequency for the proposed operation. As part of their service, coordinators should also help users understand the value and benefits of particular new

technologies. Finally, coordinators should suggest the use of new technologies recognized by the Commission, such as in the case of newly authorized narrowband operations in the 150 MHz band where the Commission has provided distance separation guidelines instead of requirements. These guidelines allow coordinators to engineer-in such systems where possible.

(10) *Summary*

53. As proposed in the *Notice* we have elevated considerably the role and responsibilities of frequency coordinators. We believe that the procedures we have adopted will improve the quality of frequency selections, expedite licensing, and improve spectrum efficiency, all to the benefit of private land mobile radio users. To achieve these objectives, we are requiring certified frequency coordinators to:

(1) provide coordination services on a non-discriminatory basis;

(2) review the Form 574 application for completeness and review items 1–25 for general correctness;

(3) process applications in order of receipt;

(4) file coordinated applications with the Commission;

(5) handle post-licensing conflicts involving frequency selection;

(6) respond to coordination requests and applications in a timely manner;

(7) recommend the most appropriate frequency;

(8) handle interservice sharing requests;

(9) maintain reasonable and uniform fees;

(10) establish a single point of contact nationally; and

(11) facilitate the use of new technologies.

B. Number of Coordinators per Radio Service

54. In the *Notice* we proposed to certify only one coordinator per radio service or frequency group in order to promote a more efficient licensing process. We indicated that if multiple coordinators were involved in coordinations for a single service, it would be extremely difficult to keep track of the pending frequency selections of the various coordinators. Further, with multiple coordinators, applicants could solicit frequency recommendations from different sources. If dissatisfied with the recommendations

of one coordinator, an applicant could seek a more favorable frequency from another coordinator. Unless coordinators were given rigid guidelines on frequency selection, it would be likely that different coordinators would recommend different frequencies. We note that this result would not be consistent with the fundamental purpose of frequency coordination, namely, to identify the best available frequency for an applicant, taking into consideration not only the needs and desires of the applicant but the best interests of other users as well.

55. Those comments that supported the single coordinator approach generally echoed and amplified the reasons we gave in making this proposal. For example, UTC stated:

> UTC concurs with the Commission that only one coordinator per service or group should be certified for purposes of providing frequency coordination. Selection of a single coordinator insures the integrity of the associated data and frequency allocation process. Unlike microwave radio signal propagation which lends itself to the use of multiple coordinators, land mobile radio signal propagation is not as predictable nor well defined. This unpredictability creates the likelihood that coordination mistakes may result if several coordinators are delegated allocation assignment authority. (UTC's comments, page 6)

Comments from other currently recognized coordinators closely paralleled those of UTC. SIRSA stated:

> The use of a single coordinating committee assures an accurate data base which insures the issuance of sound recommendations and the intelligent disposition of post licensing conflicts. Designation of the single committee is clearly administratively efficient, from the Commission's point of view, since the agency may then limit its communications and oversight activities to a single organization per service. (SIRSA comments, pages 12-13)

NABER stated that:

> the frequency advisory committee should be representative of the user group which it coordinates in order to ensure that the frequency recommendations made by the coordinator to an applicant in a competitive market will remain objective. In this respect, NABER supports the Commission's decision to select one recognized frequency advisory committee for each group which will be representative of the users in that service. (NABER comments, page iv)

56. Several parties, however, opposed this aspect of the proposal, arguing that multiple coordinators are feasible and preferable. Teletech's comments were:

> Teletech thinks the Commission does not understand the facts. If it did, the Commission would conclude that competition among different coordination service providers within a private radio service or frequency group is feasible. Given the Commission's overall commitment to promoting competition and marketplace deregulation and showing that competition is indeed feasible, the Commission would have no reason to adopt the NPRM's anticompetitive proposal. (Teletech's comments, page 2)

M.W.D. Inc. (MWD) stated:

> If the FCC were to permit monopoly frequency service providers, then the FCC would be required to police these providers to ensure that their services are timely, accurate, non-discriminatory, and provide on a non-profit basis. Yet a review of the Communications Act of 1934 provides no legal mechanism by which the FCC can police these entities. Once the FCC were to empower an entity as the monopoly coordination provider, there are no provisions under the Act for the FCC to "unempower" them. (MWD comments, page 4)

57. We have carefully weighed the arguments made in support of having multiple coordinators for a single radio service. We are convinced the single coordinator per service approach is superior for several reasons. First, having one coordinator in a radio service will substantially simplify the coordination process and will facilitate the basic purpose of coordination, which is to maximize the quality of frequency recommendations. Under a multiple coordinator approach, each coordinator, at a given moment, would have to be aware of all the other coordinators' pending recommendations. With the large number of applications filed each year, this would require a mechanism for ensuring that each coordinator for a particular service or frequency group maintained an identical data base as well as real-time computer interface capability. The logistics of handling this situation would be almost unmanageable. Certifying only one coordinator per service provides a practical solution for keeping track of pending frequency selections. We are unpersuaded that the solution of proposed by Teletech — having coordinators routinely file pending authorization requests into the General Docket 83-483 coordinator's computer system — is a practical system. Under this approach every coordinator in a particular service would have to check the pending frequency recommendation data base for every coordination so as not to duplicate another coordinator's recommendations. This would substantially increase the cost and complexity of frequency coordination, as well as increase the likelihood of errors, especially if there were a large number of entities performing frequency coordination.

58. Second, a single coordinator approach prevents "shopping" for a desired frequency. With multiple coordinators, an applicant denied coordination by one coordinator could try another coordinator in the hope of obtaining a desired frequency. We are concerned about the possibility of entities with no long term commitments to the service or the users recommending a frequency that might not be the most appropriate one for use. To provide for multiple coordinators might call for more detailed specifications as to qualifications of coordinators. Easy entry by coordinators could lead to rapid exit by those not able or willing to meet the requirements. Such unsettled atmosphere and arrangement would seriously affect the quality of frequency recommendations. At such a point, the primary objective of the coordination process, to maximize the quality of frequency recommendations, could be thwarted. This could result in an additional burden be placed on Commission resources.

59. A third benefit of the single coordinator per service approach is simplification of the licensing process by minimizing the number of points of contact between the Commission and coordinators. As the number of coordinators per service increases so does the administrative burden on the Commission. This benefit is especially important considering the likelihood of limited agency resources in upcoming years.

60. We are sensitive to the arguments made about the potential for abuse in a single coordinator per radio service system. The coordinators' responsibilities and coordination process adopted herein are designed to minimize the chances of abuse. However, if abuses do develop we will examine coordinator records and, if necessary, withdraw certification of any coordinator. We believe these safeguards, together with the representative nature of certified coordinators, are sufficient to minimize any potential for abuse.

61. Our goal of maintaining and enhancing the integrity of the coordination process must be paramount in this proceeding. Therefore, for the above reasons, we conclude that the public interest will be better served if we certify only one coordinator per service or frequency group. Contrary to the claims of some commenters, we do not view the selection of a single coordinator as a departure from our general preference for competitive offering of communication services. As we stated in the *Notice*, coordinators do not offer a communications service; their function is to assist the Commission in selecting the most appropriate frequency for the applicant, taking into account the existing user

environment. In addition, since the coordinators are organizations representative of end users, we are confident that even as exclusive providers they will fairly and impartially administer the frequency coordination process for the benefit of all. Therefore, competition in the recommendation of frequencies should not be necessary to assure the lowest price or best service.

C. Field Studies

62. Section 90.175 of the rules permits applicants to submit a field study justifying their frequency selection in lieu of utilizing the services of a frequency coordinator. The *Notice* proposed to eliminate this option. As noted earlier, the present field study approach has posed problems for licensees, the Commission, and coordinators. These problems stem from poor field study quality, from applicants' failure to observe notification requirements, and from the uncertainty field studies inject into the coordination process. Although we proposed to eliminate the field study option, we did propose to allow applicants whose requested frequency was not supported or recommended by the coordinator to submit to the coordinator a technical justification for the requested frequency. The *Notice* further proposed that if the coordinator did not accept this justification, the application along with the technical justification could be sent to the Commission for a final decision.

63. Comments on the elimination of the field study option varied widely. The International Association of Fire Chiefs along with the International Municipal Signal Association (IAFC/IMSA), Comp Comm, Inc. (Comp Comm), and AAR all suggested that the field study option be eliminated entirely, stating that the coordinator should be the exclusive originator of frequency recommendations. AAR indicated that field studies are not practical alternatives to frequency coordination in the Railroad Radio Service. Other commenters, including APCO, FCCA, AASHTO, and CSEPA stated that field studies should be used only for disputed applications. APCO stated:

> APCO comments the Commission's stated intent to eliminate the field study as the first step in any license application process. APCO is aware of the problems which are created by this practice. Often lacking defined standards and methods of verification, the field study has been totally inadequate, and severe problems have resulted from its use.
>
> APCO agrees completely that all requests should first go through the designated Coordinator. APCO agrees that the field study should serve in an appeal process in the event the applicant does not agree with the

> recommendation. Used only in this fashion, the field study will assure fair and uniform treatment for all applicants and preserve the integrity of the coordination process.
>
> The field study should not be confused with an engineered type of field test which is requested in certain instances by the Coordinator to determine field strength of signals under actual parameters. This is often a valuable and even indispensible process, and should be permitted and encouraged to improve the quality of frequency selection. (APCO comments, pages 20, 21)

Along similar lines, FCCA stated that it:

> agrees that the field study method of frequency selection must be authorized only for an applicant to dispute a coordinator's decision. The inherent delays coupled with bypassing the coordinator's data selection procedure builds in more problems than it solves. It is FCCA's opinion that the field study method has been used (at least in public safety) primarily because of user dissatisfaction with the time required by the coordination process. If methodologies and procedures of the coordination groups are brought up to speed, the use of field studies would not be necessary. By mandating the use of a common database, however, the circumventing of the coordinating process cannot be allowed on a routine basis. (FCCA comments, page 12)

64. Commenters recommending that the present field study alternative be retained included NMRA, Motorola, Teletech, and the E.F. Johnson Co. For example, NMRA stated:

> NMRA respectfully requests that the field study option of selecting frequencies should be maintained. However, in order to preserve the integrity of the Coordinator's data base which must include license applications as well as grants if it is to be meaningful, all applications (or at the very least an exact copy of the application) should be sent to the coordinator for comment. This would preclude the need for notification of co-channel licensees, a meaningless requirement which serves no purpose whatsoever. It is the coordinator, not the co-channel licensees, that needs to be notified when field studies are performed. Logically, if co-channel licensees really need any notification, then such notification should also be required regardless of whether the coordination is performed by a coordinator or by a field study. It is NMRA's firm belief that no license applicant should be forced to utilize the frequency coordinator if he has already made a valid engineering study resulting in selecting the best frequency on his own and then notified the designated frequency coordinator of his selection. (NMRA comments, pages 4-5)

65. Two commenters, NABER and UTC, stated that field study standards should be changed to make them more effective. UTC proposed that field studies be submitted directly to the coordinator. NABER stated:

> NABER's position is that if field studies are to be retained as an alternate coordination other than through use of frequency advisory committee, standards must be adopted which make them rigorous and effective. Further, that even where the field study option is utilized, the applicant be required to involve the coordinator, so that the data base remains accurate and reliable. NABER agrees that if the Commission does not impose rigorous standards for a field study, that their use should be eliminated altogether. (NABER comments, page 14)

66. We have considered the many differing views expressed on our proposal to eliminate field studies as an alternative to obtaining a recommendation from a frequency coordinator. Our proposal to eliminate the field study was based primarily on two considerations. The first was that without defined standards for field studies, the quality of submitted field study reports varies widely. Second, the present procedures relating to field studies create significant delays in processing. As noted above, upon receipt of an application accompanied by a field study, the Commission completes a Form 1049B and forwards it to the appropriate coordinator. During the period between receipt of a field study at the Commission and receipt of the Form 1049B by the coordinator, it is possible that the coordinator may have already recommended for use by another applicant the same frequency specified in the field study. This can result in the Commission processing two inconsistent applications simultaneously.

67. If we retain field studies, to correct the current situation, standards would have to be established to insure that field studies are of sufficient quality. It appears, however, that while certain general standards could be specified for field studies, detailed standards would be difficult to establish because of the many types of radio systems involved and the many different rules governing private land mobile frequency bands. A number of other standard-setting problems (*e.g.*, how detailed the field study should be, what type of tests should be required) persuade us that we cannot establish standards for field studies that are both workable and useful.

68. While field studies to date have been more disruptive than helpful to the coordination process, a properly prepared technical submission may serve a useful purpose. For example, it can identify a frequency that may be appropriate for a potential user. An applicant who performs such a technical study can include it in an application to support the requested frequency. The study may be useful to the applicable coordinator in making its recommendations. Alternatively, when relevant considerations

lead the coordinator to recommend a frequency different from that requested by the applicant, the applicant can have the coordinator forward the application and accompanying technical study to the Commission for review and final determination.

69. A technical justification will, therefore, still be an important part of the coordination and licensing process. It will not be retained as an alternative to a coordination performed by a recognized coordinator but may be a factor in the selection and licensing of a frequency. We believe this course of action combines the benefits of a field study (*e.g.*, field monitoring of frequency usages, detailed engineering) with the benefits offered by recognized frequency coordinators (*e.g.*, central point of contact, uniform standards, simplified procedures).

D. *Selection of Frequency Coordinators*

70. In the *Notice* we invited organizations desiring to be certified coordinators for a particular service, group, or pool of frequencies to file their requests as comments to this proceeding. For the thirty-two private land mobile services, groups, or pools involved here, we received more than one request to be certified as coordinator in twelve categories, a single request in eighteen categories, and no requests in two categories. Our reasons for selecting each coordinator are discussed in the paragraphs below. Where more than one entity requested certification, we looked first to ascertain whether the organization was representative of users in the radio service it proposed to coordinate.[17] Second, we examined the overall plan to coordinate the service (*e.g.*, how frequency recommendations would be made and whether all applicants would be treated equally). Third, we checked to see if the entity had experience coordinating frequencies in the service involved or any technical expertise in engineering land mobile stations. Finally, we took into consideration whether the entity had nationwide coordination capability, a nationwide data base of users in the service it proposed to coordinate, and whether the data base was automated. We will discuss selection of coordinators for each category separately. A list of the coordinators that we are certifying is contained in Appendix B.

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[17] Special emphasis is placed on representativeness since we have decided to certify only one coordinator per service. The Conference Report accompanying the 1982 Communications Amendments Act emphasized this point. "[T]he Conferees encourage the Commission to recognize those frequency coordinating committees for any given service which are most representative of the users of that service." See *supra*, footnote 8.

Public Safety Radio Services

71. *Police Radio Service* — We received requests to be the coordinator for this service from APCO and ESPRL.[18] APCO, the present coordinator in this service for most of the country, stated that it is the nation's oldest and largest public safety telecommunications organization. It has over 6000 members comprised of public safety communications officials, engineers, supervisors and technicians that are employed by tax-supported agencies at all levels of government, and by organizations supplying these agencies with goods and services. APCO has represented police communication interests before the Commission for over fifty years and has been a recognized coordinator in the Police Radio Service for over forty years. According to APCO, it has developed and implemented a frequency coordination manual for coordination in the Police Radio Service. Further, it is in the process of completing a centralized automated frequency coordination system data base. APCO's system includes a full time staff and is readily accessible by all local coordinators.

72. ESPRL is a non-profit organization of persons engaged in public safety activities within local and state governments in the New England states. ESPRL is the recognized coordinator in this service in the states of Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine. It stated that it has been promoting the interests of police radio communications in New England since 1934. In 1980, ESPRL established a New England data base in the Police, Local Government and Special Emergency Radio Services. In its comments, ESPRL stated that is does not have the financial resources to coordinate frequencies and perform other related functions for police and local government frequencies throughout the whole country, and does not wish to become a chapter or part of any other organization.

73. We believe both entities are representative of users in this service. Further, both have or will have automated data bases. As for experience, both are currently recognized coordinators in the Police Radio Service. APCO, however, offers a nationwide coordination capability whereas ESPRL does not. As we stated previously, we believe the best way to accomplish our objectives in this proceeding is by certifying a single coordinator per service. We reach this conclusion only after careful consideration of the comments, particularly those of ESPRL. ESPRL indicated that it would use an electronic mail capability to transfer frequency

[18] ESPRL asked to coordinate this service only for five New England states.

coordination data between local agencies. Further, ESPRL stated that all public safety local coordinators would have computerized capability in the near future. Once the use of computers for processing and exchanging data became widespread, ESPRL reasoned, coordination actions would be both timely and accurate, even without a single nationwide coordinator. However, we seek to ensure, to the extent practical, that frequency coordination procedures for each service are implemented uniformly across the nation. We do not believe that entities organized on a local basis, even with eventual computerization, can provide service to applicants in the same efficient and uniform manner as can a nationwide entity. For these reasons, we are certifying APCO as the coordinator in the Police Radio Service.

74. *Fire, Highway Maintenance, and Forestry Conservation Radio Services* — For each of these services we received two requests to be the coordinator, one from APCO and one from an association of users in that particular service. In the Fire Radio Service the association of users seeking joint recognition is IAFC/IMSA. IAFC is a voluntary professional membership society, numbering approximately 9000 members, comprised of senior fire officials. It stated that it is the oldest fire service organization in the country. In this joint proposal, IAFC would provide information and resources relating to fire protection needs. IMSA, the present coordinator in the Fire Radio Service, is a non-profit organization dedicated to the development of communication systems in the furtherance of public safety. According to IMSA, it has been extensively involved in emergency communications for a number of years. It has a full-time staff and is currently developing an automated data base. Organized in 1896, IMSA claimed it is the oldest organization in the world dedicated to the activities pertaining to electrical engineering, including the public safety use of radio technology. For the Highway Maintenance Radio Service, the association of users seeking recognition as the coordinator is AASHTO. AASHTO is the present coordinator in the Highway Maintenance Radio Service and is a national organization involved in dealing with safety, efficiency and operation of our nation's highway system. According to AASHTO, one of its functions is to review the radio communication needs and requirements for maintaining America's highways. AASHTO stated that it has a coordinator in every state and has an excellent working relationship with the highway maintenance community. For the Forestry Conservation Radio Service, the association of users seeking recognition is FCCA. FCCA is a

non-profit corporation representing the forestry, fish, and wildlife agencies in all fifty states. FCCA stated that it has been the only coordinator in the Forestry Conservation Radio Service since the service's inception. Its membership is open to any agency that is eligible in the radio service. Coordination is performed on a regional level by technical personnel from user agencies. In competition with these requests from associations of users, APCO filed an overall application to be the coordinator for not only these services but for all the Public Safety Radio Services.

75. The factors favoring APCO as the coordinator in each of these services are its available resources because of its nationwide structure and its claim that it will have a single automated public safety data base at its disposal. APCO stated that its membership includes employees of all public safety communications agencies. However, the comments received indicated that it does not have the overall support of the users in these three services as do the individual associations. As we stated before, we believe representativeness should be given the greatest weight in choosing the certified coordinator. We believe these individual associations of users are more representative of the particular licensees in their service. Moreover, the associations have experience in coordinating frequencies in the particular service for which they are requesting certification. All parties requesting certification for these services are relatively equal in terms of the other two factors. Consequently, we have decided to certify IAFC/IMSA as the coordinator in the Fire Radio Service, AASHTO as the coordinator in the Highway Maintenance Radio Service, and FCCA as the coordinator in the Forestry Conservation Radio Service.

76. *Local Government Radio Service* — We received requests to be the coordinator for this service from four different entities: APCO, AASHTO, IAFC/IMSA, and ESPRL. As in the other radio services discussed above, we applied the criteria discussed in the *Notice* to determine which entity should be the certified coordinator in this radio service. ESPRL will not be selected because it will not provide nationwide coordination. None of the other three entities is truly representative of all local government users. APCO has the broadest membership of the three since its membership is open to any public safety communication agency. Further, APCO currently provides coordination for the 800 MHz public safety pool. With regard to experience, each of the entities is currently a recognized coordinator in the Local Government Radio Service. However, over 90 percent of the local government

coordinations are presently provided by APCO. APCO, IAFC/IMSA, and AASHTO all stated that they would meet the unified coordination concept proposed in the *Notice*. As for data base capabilities, APCO stated it is compiling a complete automated public safety data base. Considering the foregoing, we believe APCO would be the best choice for coordinating this service. Therefore, we are certifying APCO as the coordinator in the Local Government Radio Service.

77. *Special Emergency Radio Service* — Three entities requested to be the certified coordinator for this service: APCO, ESPRL, and NABER/IAFC/IMSA (filing a joint proposal).[19] Again, we will not select ESPRL because it does not meet the nationwide coordination criterion. APCO is in the process of compiling its automated frequency coordination public safety data base. NABER, in providing coordination for business users, has successfully used an automated data base system for a number of years. Both of the remaining coordinator candidates have experience in coordinating emergency services, APCO in the Police Radio Service and IMSA in the Fire Radio Service. As before, we believe the key element in selecting a coordinator is representativeness. Neither candidate is completely representative of all of the diverse groups in the Special Emergency Radio Service. However, we believe NABER/IAFC/IMSA comes closest. We agree that APCO is representative of many emergency users in this service. However, IMSA and IAFC are also representative of emergency users in this service, possibly more so than APCO, since a substantial amount of EMS in this country is provided by fire departments. Moreover, we believe IMSA has shown particular sensitivity to special emergency needs in the past. For example, in PR Docket No. 84-370, IMSA supported the reallocation of two frequency pairs to the Special Emergency Radio Service for shared use with the Police Radio Service. APCO did not support this reallocation. As for the non-emergency users, we believe NABER/IAFC/IMSA is more representative than APCO because of NABER's involvement. In fact, APCO stated that:

> its interests lie stronger with Emergency Medical response operations than with non-emergency operations. (APCO reply comments, page 4)

and that:

> non-emergency operations be moved to others portions of the spectrum and coordinated by others. (APCO reply comments, page 5).

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[19] The NABER/IAFC/IMSA proposal was filed with their reply comments.

It is critical that a coordinator be equally representative of all licensees in the service. Accordingly, we are certifying NABER/IAFC/IMSA as the coordinator in the Special Emergency Radio Service.

78. APCO proposed that there be a single coordinator for all the public safety radio services, and asked to be certified as the sole coordinator. According to APCO:

> Combining all of the Public Safety Services into a single public safety data base would result in better utilization of the spectrum available to public safety communications. Consolidation would permit close interagency cooperation, expedite the present interservice cross coordination process, reduce costs of coordination through economies of scale, improve standardization of procedures, simplify administrative overview, and reduce significantly the number of coordination agencies with which the Commission must deal. (APCO comments, page 10)

IAFC/IMSA, AASHTO, and FCCA took exception to APCO's proposal. They argued that APCO is not truly representative of users in all of the public safety services and that it has overemphasized the benefits, if any, from consolidation of these services. IAFC/IMSA claimed that APCO is a "Police Service-oriented association" and that being a single purpose association there is no basis on which APCO can rest its claim of representativeness of the Fire Service. AASHTO and FCCA both stated that the fact that some non-police local government personnel hold membership in APCO does not ensure that APCO is truly representative of the Highway Maintenance and Forestry Conservation services.

79. We agree with APCO that there would be advantages to consolidation of coordination of a number of services. For example, having a single point of contact for all public safety services may be more desirable for the Commission from a paperwork standpoint. Additionally, having a single public safety data base could result in increased efficiency in the handling of interservice sharing requests. Nonetheless, different services have different needs and users. Where, as here, existing users indicate a strong preference for a single service coordinator and we have a successful working relationship with that entity, we are not inclined to disturb it. On balance, therefore, we believe the public safety community would be better served at this time by retaining separate coordinators in the public safety radio services.

Industrial Radio Services

80. *Power Radio Service* — The sole request to be the coordinator for this service was received from the Utilities Telecommunications Council (UTC). UTC is a non-profit organization representing in excess of 2000 of the nation's electric, gas, water, and steam utilities in telecommunications matters. UTC is the present coordinator for the Power Radio Service and has proposed to provide frequency coordination for the Power Radio Service by continuing its processing of frequency requests in a manner consistent with present practices as modified to reflect requirements adopted as a result of the *Notice*. UTC proposed to continue to utilize its regional coordination process because regional coordinators are intimately familiar with the topographies and other unique characteristics of their regions. To assist in the frequency coordination process, in addition to a centralized data base, regional coordinators have detailed land maps, charts, and the most up-to-date Federal Aviation Administration (FAA) reports available. UTC will establish a centralized National Examination Center in Washington, D.C. to review applications. It stated that the regional coordination/national processing approach will effectively serve the needs of Power Radio Service users. Additionally, UTC indicated that it will take an active role in post-licensing conflicts, ensuring that the interests of all parties will be considered. However, UTC stated that it is unwilling to be financially responsible for the resolution of these conflicts. Performance criteria as outlined in the *Notice* are realistically within the scope of UTC's abilities. Because of its representativeness, expertise, and experience, we are certifying UTC as the Power Radio Service coordinator.

81. *Petroleum Radio Service* — The sole request to be the coordinator for this service was submitted by the Central Committee on Telecommunications of the American Petroleum Institute (API). API is composed of representatives of the nation's petroleum and natural gas companies. Further, its Petroleum Frequency Coordinating Committee (PFCC) is the present coordinator for the Petroleum Radio Service. API stated that it will continue to process most requests for frequency coordination as it has in the recent past. Its coordination efforts are automated and centralized in API's offices in Washington, D.C. API's coordination system consists of three subsystems: (1) the Application Tracking Subsystem; (2) the Coordination Subsystem; and (3) the Certificate Procedure Subsystem. It

indicated that its coordination process will operate in a fashion similar to that described in the *Notice*. It proposed to modify its automated system by mutual arrangement with other coordinators to accomplish any necessary interservice and out-of-service functions. In addition, it will modify its equipment when access to the Commission's data base is made available through a third party contractor. It further proposed to encourage the use of spectrum efficient radio equipment that does not cause harmful interference to co-channel users and, where appropriate, it will suggest to applicants the use of new technology. Because of API's representativeness, expertise, and experience, we are certifying API as the Petroleum Radio Service coordinator.

82. *Forest Products Radio Service* — The only request to be the coordinator for this service was submitted by Forest Industries Telecommunications (FIT). FIT is a national organization of users licensed in the Forest Products Radio Service, and states that at least 85% of the licensees in the Forest Products Radio Service are FIT members. FIT has had more than 35 years of experience as the frequency coordinator for this service and has developed a complete and accurate data base of assignment and usage of forest products frequencies. FIT stated that it now provides to its members many of the services coordinators would undertake under the Commission's proposals. FIT currently reviews all applications and participates in post-licensing conflicts. It will develop a system for accessing the data base of other coordinators and supported the "electronic mailbox" approach. Because of FIT's representativeness, expertise, experience, and existing data base, we are certifying FIT as the coordinator in the Forest Products Radio Service.

83. *Motion Picture Radio Service* — We received requests from two entities to be the coordinator for this service, one from FIT and one from the Alliance of Motion Picture and Television Producers (AMPTP). Subsequently, FIT withdrew its request, leaving AMPTP as the lone candidate. AMPTP is a non-profit trade association of organizations engaged in the production of motion pictures and television. AMPTP stated that it represents in excess of 200 of the major and independent producers of motion pictures and television programs in various collective bargaining negotiations. As the single industry-wide representative of the motion picture industry, AMPTP claims it stands prepared to carry out the frequency coordination functions for the Motion Picture Radio Service. AMPTP appears to meet the most important coordination criterion, that of representativeness. The

Motion Picture Radio Service has never had a frequency coordinator. AMPTP stated that it has not served as a frequency coordinator and does not possess in-house engineering or computer skills. However, AMPTP has formed a frequency coordination committee composed of individuals experienced in private land mobile communications in motion picture production. They possess the technical expertise necessary to set the coordination policies as well as oversee the coordination process. AMPTP has informed the Commission that it has become a voting trade association member of the Special Industrial Radio Service Association, Inc. (SIRSA). Should it be designated the frequency coordinator for the Motion Picture Radio Service, AMPTP stated that it will enter into an arrangement with Spectrum Management Systems, Inc. covering the use of computer hardware and software programs for the provision of frequency coordination in the Motion Picture Radio Service. Based on its representativeness and proposed arrangements for providing coordination, we are certifying AMPTP as the coordinator for the Motion Picture Radio Service.

84. *Relay Press Radio Service* — We received requests from two entities to be the coordinator for this service. These requests were submitted by FIT and the American Newspaper Publishers Association (ANPA). FIT subsequently withdrew its request for certification in this service. ANPA is a national, non-profit trade association representing the vast majority of daily and non-daily newspapers. Therefore, it meets the representativeness criterion. The Relay Press Radio Service has never had a frequency coordinator. ANPA has indicated that it is negotiating with qualified organizations for the provision of technical support in making frequency recommendations. It proposed that all applications submitted to ANPA will first be reviewed by its technical consultant. Applications will then be forwarded to the ANPA frequency coordinating committee with a recommendation. ANPA will decide on the appropriate action needed and will inform the applicant of its decision before filing the application and the recommendation with the Commission. ANPA proposed to utilize the coordination flow process designated by the Commission. Except for the Commission's data base, there is no existing data base for the Relay Press Radio Service. ANPA stated that if economically practical, it will establish a data base as soon as possible. Based upon ANPA's representativeness and proposed coordination procedures, we are certifying ANPA as the coordinator for the Relay Press Radio Service.

85. *Special Industrial Radio Service* — The only request to be the coordinator for this service was filed by the Special Industrial Radio Service Association, Inc. (SIRSA). SIRSA, a non-profit association with a membership of 12,000 Special Industrial Radio Service licensees, is currently the recognized coordinator in this service. It has invested over $600,000 in software and hardware to develop a fully automated coordination process that: (1) accepts and initiates an application; (2) identifies all pertinent technical criteria about an application; (3) performs searches of the available bands for assignment; (4) assigns the frequency chosen by the coordinator, automatically updating appropriate technical data files; and (5) prints a frequency coordination certificate. SIRSA stated that it prepares over 1000 license applications annually for its members. For 1985, SIRSA projected that it would issue in excess of 6,500 certificates of frequency coordination. SIRSA indicated that it responded to 80% of the requests for frequency coordination within one week and to 90% of the requests within 2 weeks. SIRSA stated that it is prepared to access by "dial up" equipment, upon being authorized to do so, the data bases of all committees responsible for assignments that may be shared by Special Industrial eligibles. Similarly, it is prepared to grant such "read only" access to its data base to other certified committees having a legitimate need to review that information. Because of SIRSA's representativeness, expertise, and experience, we are certifying SIRSA as the coordinator for the Special Industrial Radio Service.

86. *Manufacturers Radio Service* — The only request to be the coordinator for this service was filed by the Manufacturers Radio Frequency Advisory Committee (MRFAC). MRFAC is a non-profit, non-stock corporation established to coordinate uses of the radio spectrum, particularly in the Manufacturers Radio Service. MRFAC's membership comprises a cross section of the manufacturing industry. It stated that its 99 member firms range from large national and multi-national firms to very small firms. MRFAC indicated that since the 1950's, it and its predecessor organizations have represented the interests of Manufacturers Radio Service licensees before the Commission, attempting to assure the availability of efficient and effective radio communications for the nation's manufacturing firms. MRFAC has been the recognized coordinator in this service since 1958 and utilizes district coordinators, each responsible for a particular area of the country, to provide coordination services. When a district coordinator completes a coordination, the MRFAC committee represen-

tative is advised of the recommended frequency and, in turn, sends the applicant a frequency recommendation letter. MRFAC stated that it has acquired the necessary components to establish an automated Manufacturers Radio Service data base. However, it has not totally completed automation plans, particularly for accessing the Commission's data base. It indicated that when the Commission finalizes its access decisions it will take steps necessary to ensure data base access. MRFAC stated that it will endeavor to comply with whatever requirements the Commission ultimately adopts in this rulemaking. Accordingly, because of its representativeness we are certifying MRFAC as the coordinator in the Manufacturers Radio Service.

87. *Telephone Maintenance Radio Service* — As with the other industrial services, we received only one request to be the coordinator for this service. It was submitted by the Telephone Maintenance Frequency Advisory Committee (TELFAC). TELFAC is a non-profit association responsible for the creation and maintenance of a national, standardized frequency management program for eligible users in the Telephone Maintenance Radio Service. It has a contractual arrangement with Spectrum Management Services, Inc. to obtain automated services to provide the actual mechanism for frequency coordination services. TELFAC's Council, composed in part of licensees in the Telephone Maintenance Radio Service, is representative of the interests of the telephone maintenance industry. TELFAC stated that it is prepared to make any other further financial commitments necessary to implement the frequency coordination services outlined in the *Notice* in this proceeding. Based upon its representativeness and coordination experience, we are certifying TELFAC as the coordinator in the Telephone Maintenance Radio Service.

88. *Business Radio Service* — The only request to be the coordinator for this service was filed by the National Association of Business and Educational Radio, Inc. (NABER). NABER has been the coordinator in the Business Radio Service for frequencies above 450 MHz since 1970. It is a national non-profit association of land mobile licensees, users, and vendors of private land mobile products and services. It currently utilizes a centrally located automated data base in support of its coordination activities. In the past four years, NABER stated it has performed an average of 32,000 frequency coordination requests per year and processes over 35 percent of the requests received in one day; over 50 percent in three days; and over 90 percent in 10 days. NABER also indicated that it has actively been a part of Commission

proceedings that affected the interests of the Business Radio Service licensees, users, entrepreneurs and manufacturers in the land mobile services. NABER has also been involved in the promotion of more efficient utilization of already allocated spectrum. In addition to supporting frequency coordination as a means to utilize available spectrum more effectively, NABER also supported, where practicable and not disruptive of service to existing users and systems, the utilization of new, more spectrum-efficient technology such as narrowband techniques in the 150 MHz band. There is presently no coordinator for frequencies in this service below 450 MHz. NABER stated, however, that it will develop a data base and apply its knowledge of business radio user needs to coordinate the frequencies below 450 MHz as well. Because of its representativeness, expertise, experience, and proposed coordination procedures, we are certifying NABER as the coordinator for the Business Radio Service.

89. *Industrial Radio Groups* — There is a group of ten 450 MHz frequency pairs in the Business Radio Service reserved for servicing and supplying aircraft in and around airports. Beyond certain geographical limitations, these frequencies are available for general Business Radio use. NABER is the only party requesting to be the coordinator for this group of frequencies. Until now, these frequencies have been coordinated by Aeronautical Radio, Inc. (ARINC). In its comments, however, ARINC indicated that since these frequencies are all assigned at most airports, very little coordination effort takes place for these reserved frequencies. Since the frequencies are also available to the Business Radio Service, ARINC asked that its coordination authority be transferred to NABER. Upon consideration of these comments and because the frequencies are listed in the Business Radio Service table of frequencies, we are certifying NABER as the coordinator for the ten frequency pairs in this group.

90. Another group of frequencies in the Business Radio Service are those reserved for central station alarm operations. The Central Station Electrical Protection Association (CSEPA) was the only entity requesting to be certified as the coordinator for these frequencies. CSEPA is a non-profit association of operators of electrical protection central stations, and its frequency advisory committee currently provides coordination for these frequencies. CSEPA stated that is is representative of the central station industry and that it has the staff and facilities required to continue its coordination service. CSEPA is studying proposals for computer assistance with its frequency coordination work,

although it states that with only 35 coordinations per year, computer assistance is not indispensable to its coordination efforts. Because of CSEPA's representativeness and coordination experience, we are certifying CSEPA as the coordinator for this group of frequencies.

91. The last industrial radio group is the Southern Louisiana-Texas Offshore Zone frequencies (see Section 90.315 of the Commission's rules). The only request to be the coordinator for these frequencies was filed by API. Because these frequencies are used almost exclusively by Petroleum Radio Service eligibles, and because API is currently providing coordination for the frequencies, we are certifying API as the coordinator for this group of frequencies.

Land Transportation Radio Services

92. *Motor Carrier Radio Service* — Frequencies in this service are allocated for use by persons or entities providing: (1) a common or contract motor carrier service for distribution, collection and transportation of property within and between urban areas; (2) transportation of passengers between urban areas; and (3) transportation of passengers within a single urban area. Currently, each of these groups has a different coordinator. The only request to be the coordinator for this service, however, was filed by the American Trucking Association (ATA). It asked to remain the coordinator for the frequencies used by motor carriers distributing, collecting, and transporting property within and between urban areas. ATA is the national trade association of the motor carrier industry and utilizes its own mainframe computer for maintaining its frequency data base. Being representative of the industry and having prior coordination experience makes ATA a qualified coordinator in this service.

93. With regard to the two other categories of frequencies in the Motor Carrier Radio Service, i.e., transportation of passengers between urban areas and within a single urban area, no requests to be the coordinator were received. The present coordinators for these two categories chose not to apply. In the *Notice* we indicated that if there was no interest expressed in coordinating a particular radio service or group, we would combine that service or group with another.[20] There are 29 frequencies allocated for local and long distance passenger transportation services. Consequently, it does not appear that assignment of the coordination

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[20] *Notice*, paragraph 15, footnote 18.

responsibility for these frequencies to an existing coordinator would create any significant impact or hardship upon its coordination process. We believe that ATA, which stated in its comments that it is representative of the motor carrier industry, would be in the best position to assume this responsibility. We realize that property and passenger transportation operations are somewhat different. However since many frequencies in the Motor Carrier Radio Service are shared by all eligibles in this service, a single coordinator for the entire service would be desirable. Accordingly, we are certifying the American Trucking Association as the frequency coordinator for all frequencies assigned to the Motor Carrier Radio Service.

94. *Railroad Radio Service* — The only request to be the coordinator for this service was filed by the Association of American Railroads (AAR). AAR is a non-profit organization of member railroad companies generating approximately 97% of the total operating revenues of all railroad companies in the United States. AAR is the present coordinator for the Railroad Radio Service and has been coordinating frequencies in this service for 40 years, even before the service was formally established. Besides being representative of users in the service, AAR stated that it has the organization, personnel, data processing capabilities, and intimate knowledge of the industry necessary to provide effective coordination. AAR has developed and uses a national frequency assignment plan which is essential for effective coordination in a complex radio service such as the Railroad Radio Service. Its data base is contained in one of the largest computer installations in Washington, D. C. Considering its representativeness, expertise, and coordination experience, we are certifying AAR to be the coordinator in the Railroad Radio Service.

95. *Taxicab Radio Service* — The only request to be the coordinator for this service was received from the International Taxicab Association (ITA). ITA is a non-profit trade association for the taxicab industry. It has been the coordinator in this service for the past 14 years. ITA recently replaced its manual frequency coordination system with a computerized system using, under contract, a central computer system that provides frequency search services, applicant and data base access, partial interservice frequency coordination data base sharing, and coordination certificate printing. ITA stated that it supports the Commission's frequency coordination proposals to improve frequency coordination in today's congested frequency bands. Accordingly, because of ITA's representativeness and coordination

experience, we are certifying ITA to be the coordinator for the Taxicab Radio Service.

96. *Automobile Emergency Radio Service* — As with the other land transportation radio services, we received only one request to be the coordinator in the Automobile Emergency Radio Service. The request was submitted by the American Automobile Association (AAA), the present coordinator in this service. AAA stated that it is in the process of establishing a computerized data base to assist in the frequency selection process. Because of its close coordination with users, and supervision of its relatively small data base, AAA believes that its records may be more detailed and accurate than those of the Commission. With the establishment of its computerized data base, AAA believes that it will have no need to access the Commission's data base, but will do so if required. It also stated that since the frequencies assigned to the Automobile Emergency Radio Service are not shared with any other radio service and since only two requests for interservice sharing have been received to date, direct access to other coordinator's data bases is not necessary. AAA stated that when required, it will participate in interservice sharing requests, but because of the expected low number of such requests, it will do so by letter or telephone. As discussed above, each coordinator will have flexibility in designing its own system to handle interservice sharing requests. Whatever system AAA decides to establish will have to be compatible and interoperable with other coordinator's systems to enable AAA to meet the speed-of-service requirement. Considering AAA's coordination proposal, and based upon its representativeness of users and its experience in coordinating frequencies in this service, we are certifying AAA as the coordinator in the Automobile Emergency Radio Service.

800 MHz and 900 MHz Frequencies

97. *General* — In addition to the specific radio services regulated under Part 90, the *Notice* stated that we intend to certify a coordinator in the 900 MHz paging pool and in each of the six 800 MHz categories.[21] In the 900 MHz paging pool and in three of the six 800 MHz categories we are faced with the choice between a coordinator that is an established user group and an entity that is experienced in coordination procedures for common carrier systems (Comp Comm). In the 800 MHz Business category

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[21] The six 800 MHz categories consist of Business, Industrial/Land Transportation, Public Safety, and SMRS pools along with the original trunked frequencies and the original conventional frequencies.

the user group is NABER, in the Industrial/Land Transportation category the user group is SIRSA, in the Public Safety category it is APCO, and in the 900 MHz paging pool it is NABER. Each of these users groups has been coordinating frequencies in the respective frequency categories since the time those frequencies were made available for use. In cases where the category or pool is available to other users in different radio services, such as the Public Safety, Industrial/Land Transportation and 900 MHz pools, these user group coordinators indicated that they are supported by the other user groups representing those services. Comp Comm, in support of its request to coordinate the 900 MHz paging pool and four of the 800 MHz categories, stated that it is a communication consulting firm offering a broad and diverse range of services to the communications industry, including coordination of public land mobile frequency assignments. It maintains a full engineering staff supported by state-of-the-art automation equipment. Comp Comm argued that its extensive experience and technical expertise in the design of land mobile communication systems and in the development and management of data bases makes it the most logical choice to be the coordinator for those frequencies.

98. The primary factor supporting Comp Comm's proposal is its technical expertise in system design. Such technical expertise is a necessity in coordinating public land mobile radio systems because each system must be individually engineered to protect other licensees' service areas. In the private radio services, however, assignments are not based on predicted service area contours, but are either shared or assigned with a specific mileage separation. Coordinators in the private land mobile radio services must also have technical expertise since they may have to "engineer-in" systems when conditions warrant, and must always consider system parameters to minimize interference. However, there are factors other than technical issues that also must be considered in making private land mobile assignments. For example, since frequencies may be shared, user compatibility is often an issue. All established user groups requesting to be coordinators in these pools have demonstrated the necessary technical expertise and capabilities. We have repeatedly stated that the most important criterion in choosing the coordinators is representativeness. In this case, the user groups — NABER, APCO, and SIRSA — are most representative of eligibles for these frequencies. They are endorsed by a broad cross section of the users in the pool they wish to coordinate.

99. NABER was recommended as the frequency advisory committee for the Business Radio category at 800 MHz by consent of the Land Mobile Communications Counsel (LMCC), of which NABER is a participating member. The Commission accepted the recommendation of LMCC, and NABER has coordinated those frequencies since their release in late 1982. NABER has also coordinated the 900 MHz private paging frequencies since the Commission recognized it as the coordinator for such frequencies in 1982. Similarly, APCO has been the coordinator for the 800 MHz public safety category since late 1982. APCO is developing a centralized, automated data base accessible to all its local coordinators. SIRSA is representative of special industrial users through its membership policy and board of directors composition. It is the present coordinator for the Industrial/Land Transportation 800 MHz category. SIRSA was given that responsibility, in part, because of the support it received from the LMCC, which stated that SIRSA has the "proven skill and experience" as a coordinator "as well as existing computer capabilities" to build and monitor the necessary 800 MHz data base. Accordingly, because of their experience in coordinating these categories, we are certifying NABER as the coordinator in the 800 MHz Business category and the 900 MHz paging pool, SIRSA as the coordinator in the 800 MHz Industrial/Land Transportation category and APCO as the coordinator in the 800 MHz Public Safety category.

100. *800 MHz SMRS category* — In this 800 MHz category we received requests to be the coordinator from three entities —Comp Comm, American SMR Network Association (ASNA), and a joint proposal from NABER and the National Mobile Radio Association (NABER/NMRA). Comp Comm advanced the same arguments for certification in this category as it did in the other 800 MHz categories. In contrast, both NABER/NMRA and ASNA stressed the representativeness issue. There is at present no coordinator for the 800 MHz SMRS category. SMRS applicants for trunked frequencies may specify on the basis of a field study the frequencies desired or may request the Commission to select and assign frequencies for the system. Regarding the question of whether the Commission should certify a coordinator in the SMRS category, commenters argued that use of a coordinator would result in greater spectrum efficiency. For example, NABER/NMRA stated that:

> Although both NMRA and NABER can appreciate certain arguments which might oppose the need for such coordination, both organizations, as well as NCA (Network Communications of America) and CTIA (California Trunking Interference Association) believe the more efficient and effective utilization of frequencies allocated for SMR systems can be obtained by use of a user representative frequency advisory committee. (NABER/NMRA Joint Proposal, page 11)

101. NMRA and NABER have joined efforts with the endorsement and participation of the Network Communications Association and the California Trunking Interference Association to form the NMRA/NABER SMR Frequency Advisory Committee (Committee) to seek certification as the coordinator for the 800 MHz SMRS category. The four organizations jointly represent over 400 licensees of one or more SMR systems. They asserted that the Committee is responsive to the needs of the SMR industry and also reflects the varying and diverse interests of that industry. Such interests include small and large independent SMR licensees, equipment manufacturers who also own and operate SMR systems, and end users on such systems who are licensees and must also be properly represented in the coordination process. NABER has over 6000 members with a special SMRS section. It has represented the land mobile community since 1965 and has been a recognized frequency coordinator since 1970. It has the requisite experience and expertise to be certified as a coordinator. They argue that they are the only entity requesting certification in this category that is representative of all persons who are eligible for radio facilities in this category. NMRA is a nationwide, non-profit association of small businesses engaged in sales and maintenance of radio equipment and systems. NMRA members, in most cases, own and operate conventional and trunked SMR stations as well as multiple licensed systems ("community repeaters") throughout the United States. NMRA stated that approximately 200 members of NMRA are also licensees of one or more SMR stations. The predecessor organization to the NMRA was formed by a group of California radio sales and service dealers in 1955. One of the functions of that organization was to provide local frequency coordination in Southern and Northern California to its members and non-members. The individuals involved are still active in NMRA. The joint proposal states that the data base management and day-to-day frequency coordination function for the Committee will be performed by NABER under the policies and procedures established by the Committee. However, prior to making the final coordination, NABER, on behalf of the committee, will consult with recognized regional groups for their input so as to take into

account local recognized technical concerns. As shown above, NABER brings significant expertise to this joint effort both in terms of technical capabilites and familiarity with the user community.

102. ASNA stated that it is a recently-organized, non-profit, national trade association whose voting membership will be composed exclusively of SMRS base station licensees. ASNA based its request to be the coordinator for this category solely on its representativeness of SMRS base station licensees. It indicated that exclusive of manufacturers, its current members already represent some 250 SMRS systems throught the country. ASNA did not indicate its size in terms of numbers of members. It proposed to provide effective frequency coordination in accordance with applicable Commission requirements by contracting with a third party to provide such service under ASNA's direct management and control. ASNA stated that its coordination plan would provide an economical and efficient method for assigning frequencies for SMR systems and would minimize the Commission's administrative burden. ASNA does not itself have experience or expertise in frequency coordination nor did it demonstrate independent capability to perform all of the requirements imposed by the Commission.

103. We have considered this matter and the views of the parties carefully. We have decided not to select a coordinator for this category at this time, contrary to our proposal in the *Notice*. We base this decision on several significant problems that stem from key differences between this category and the other private land mobile radio services and categories. First, in the other categories and services, the Commission has set procedures for processing applications that are fully established and understood by coordinators. In contrast, our SMR licensing policies are still evolving as this relatively new industry matures. Moreover, there are two disparate sets of rules governing SMR applications; these rules will be harmonized in September 1987 (see Part 90, Subparts M and S).

104. Second, because of the nature of the SMR business, we generally receive applications for more channels than are available for assignment in the SMRs category in a given geographic area. This factor results in on-going Commission actions to cancel the authorizations for channels not loaded to prescribed levels in geographic areas in which all SMR channels have been assigned. Currently, there is a "day-to-day application window" procedure governing channels that become available as a result of license

cancellations in the SMRS category. Applications for these channels are accepted only on or after dates specified by the Commission in public notices. Upon receipt, applications are date stamped in the Licensing Division of the Private Radio Bureau in Gettysburg, Pennsylvania. All applications filed on the same date for a given area are considered together. Applications filed after that date for that area are dismissed if no channels are available for assignment. As a result, it is of critical importance that applications be received by the Commission at the appropriate time. We are not prepared at this time to instruct a coordinator on how to handle such applications.

105. A final concern stems from the recent Commission rulemaking which accorded fully loaded systems a priority in the assignment of frequencies. Currently, the Commission checks the loading status of the application prior to affording priority. While a coordinator may be able to perform this function in the future, our licensing processes are not at that stage at the present time.

106. Therefore, even though a coordinator could provide a valuable service by coordinating the SMRS category, the unique licensing procedures in the 800 MHz SMRS category convince us that the anticipated public benefits of certifying a coordinator do not exceed the potential costs. Accordingly, we will continue to select and assign channels in the SMRS category under our current mileage separation standards. As before, however, we will allow SMRS applicants to specify frequencies on their applications. We may revisit the issue of coordination of trunked SMR frequencies at a later time.

107. *800 MHz original trunked frequencies* — In the original 800 MHz trunked category we received requests from ASNA, NABER/NMRA, and APCO to be the certified coordinator. APCO, however, only wants to coordinate public safety use of this category. Since the large majority of these channels are licensed for SMRS operations, the same concerns that we had about utilizing a frequency coordinator in the 800 MHz SMRS category are applicable here. There is an additional concern relating to the administration of the waiting lists applicable to these frequencies and the melding of the two rule subparts referenced above. Until these issues are resolved, the Commission is not prepared to provide the necessary guidance to a frequency coordinator. Accordingly, we will continue to select and assign channels in this category.

108. *800 MHz conventional frequencies* — Three parties — NABER, SIRSA, and APCO — filed requests to be the coordinator for the 800 MHz conventional frequency category. Currently, APCO coordinates public safety use, NABER coordinates business use (including conventional SMR systems[22]) and SIRSA coordinates industrial and land transportation use. The use of three coordinators in this particular category has worked well and has evolved into a workable, manageable system. We see no reason, nor has any been presented, to deviate from the current situation, even though this is a departure from our overall policy and direction. The coordination of frequencies in the 800 MHz conventional category is viewed differently at this time because licensing is based on the type of technology used rather than the category of user who is to employ them. This difference is important in view of our consistent emphasis on the need for a coordinator to be representative of the users in the category for which it would be certified. None of the entities who applied are individually representative of the existing users of the frequencies because, for licensing purposes, there is no separation of distinction made with regard to the service in which a user is eligible. APCO, SIRSA, and NABER combined, however, are representative of most if not all of these users. With more than one coordinator for this category, each one will be expected to coordinate with the other two before it sends a recommendation to the Commission. However, we do not envision this to be a major problem. First of all these three coordinators are successfully working together now to provide effective coordination in this category. Second, the fact that there are only three coordinators coupled with the amount of license activity in this category should minimize the problem potential here. In regard to the question of increasing the administative burden we believe having three coordinators in one limited category should not have an adverse impact on Commission resources. Further, the alternative to this approach would be to have the Commission take on the coordination responsibilities, something it is not in a position to do with the likelihood of limited agency resources in upcoming years. Finally, by requiring applicants to apply through the coordinator representing the category in which they establish eligibility, we can minimize shopping. For these reasons we are making an exception to our one coordinator per category ap-

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[22] A conventional SMR system functions in the same way as a community repeater except the base station (repeater) is not multiple licensed, it is licensed only to the service provider.

proach. Accordingly, in the 800 MHz conventional category (original 150 channels) we are certifying APCO to coordinate all public safety and special emergency radio use, NABER to coordinate all business use (including conventional SMRs), and SIRSA to coordinate industrial and land transportation use.

E. *Application Submission and Filing Requirements*

109. We now consider which applications will require frequency coordination before Commission processing and which applications will not require frequency coordination prior to submission to the Commission. After careful analysis of the comments, we have decided to modify somewhat the procedures proposed in the *Notice*. As previously discussed, we have modified the coordinator's application review responsibilities. An applicant can still either specify a frequency or request that the coordinator select a frequency. We also have left the assignment methodology up to the coordinator as proposed in the *Notice*. Further, under the procedures adopted herein, when a particular frequency is requested by an applicant in the application submitted to the coordinator, a showing supporting the use of that frequency or frequencies must be included. The extent of the showing needed depends upon the particular system proposed.[23] We believe this one-step approach will save time and effort in the overall licensing process and, therefore, is consistent with our objectives in this proceeding. In cases where the application submitted to the coordinator is incomplete or if there is an obvious error, we are allowing the coordinator to make the necessary corrections provided that applicant approval is obtained. Again, we believe allowing the coordinator to make minor changes will speed up the overall licensing process.

110. The only other modification we are making to the proposals in the *Notice* is when the coordinator disagrees with an applicant's request for a specific frequency, and the applicant still wants to pursue the request. In the *Notice* we envisioned a two-step process in this situation. We proposed that an applicant could request a frequency in its application and, if the coordinator disagreed with the requested frequency, the applicant could then submit a technical showing to the coordinator supporting its request. If the coordinator still disagreed with the applicant, the application, technical submission, and the coordinator's written

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[23] For example, if the application is for an add-on station to a multiple licensed system only a statement to that effect is needed. If the application is for a completely new system a more detailed showing must be included.

reasons for rejection would be submitted to the Commission for evaluation and decision. We have decided to combine these procedures into a single step to make the process simpler. Under our new procedures, applicants desiring a specific frequency must submit a technical justification for that frequency along with the application. If the coordinator disagrees with the justification, the application, the technical submission, the coordinator's written reasons for rejection, and the alternate frequency recommendation shall be submitted to the Commission for evaluation and decision.

111. *Applications requiring coordination* — In the *Notice*, we described a number of problems in the present frequency coordination process and stated that our objective in this proceeding is to improve the quality, speed and efficiency of frequency coordination in the private land mobile radio services. Fundamental to achieving these objectives is maintaining an accurate and up-to-date private land mobile data base. Without access to accurate and current information, a coordinator cannot make sound frequency recommendations to applicants, and the Commission loses its ability to review effectively the frequency recommendations before licensing. In order to ensure that accurate and current data are available, we proposed coordination procedures somewhat different from those in use today. Under our proposal all applications submitted on a Form 574 (with certain minor exceptions) for new stations, add-on users to existing stations, and station modifications, regardless of frequency band, were first to be submitted to the certified coordinator for the applicable radio service or pool. The categories of applications to be coordinated under our proposal included new stations as well as station modifications for changes in frequency, emission, power, antenna height, number of mobile stations, location, ownership, and class of station.

112. We did not receive specific comments on the issue of which general categories of applications should or should not require coordination. However, the commenters generally agreed with our proposals and indicated that any steps that would improve the data base from which frequency selections are made should be taken. For example, NABER stated that "in order to insure the accuracy and reliability of the data base as well as its timeliness, the coordinator must be kept in the frequency selection and licensing process loop" (NABER comments, pages 8-9). For the reasons stated above, we remain convinced that, as a general rule, all applications filed on Form 574 for new stations in all frequency bands, and all station modifications concerning

changes in frequency, class of station, emission, power, antenna height above ground, and location or number of mobiles must be submitted first to the applicable coordinator. Additionally, applications for reinstatement of authorizations expired for more than 6 months shall be submitted to the coordinator.

113. *Applications not requiring coordination* — Exceptions to the coordination requirement listed in the *Notice* were applications for:

(a) frequencies shared with the federal government;

(b) frequencies below 25 MHz;

(c) frequencies specified in the rules for itinerant use;

(d) special temporary authorities (STAs) for less than 180 days;

(e) frequencies for developmental operations;

(f) frequencies in the Radiolocation Service;

(g) frequencies for mobiles operating in the 470-512 MHz band where the frequency pair is assigned on an exclusive basis; and

(h) frequencies for mobile and control stations in the 800 MHz band where the frequency pair is assigned on an exclusive basis.

We proposed to have applications in these categories sent directly to the Commission.

114. Those commenting on the first six exceptions unanimously supported our proposal. Commenters agreed that these particular applications do not lend themselves easily to coordination because the coordinator cannot be aware of the complete operating environment, even if coordination is required. For example, the use of frequencies shared with the federal government requires coordination with, and the concurrence of, the federal government. A private coordinator cannot provide that coordination, which must be done through the Interdepartment Radio Advisory Committee. Frequencies in the Radiolocation Service pose a similar problem in that they are shared with other entities. Two other groups of frequencies, those reserved for itinerant use and frequencies used for developmental operations, also fall into this category. Itinerant frequencies are authorized for nationwide use and are not limited to a specific location. Developmental frequencies are authorized on a secondary, non-interference basis on any frequency in the service in which an applicant proposes to operate. Because of these factors, the coordinator could not be assured it is recommending the most appropriate frequency.

Frequencies below 25 MHz are also very difficult to coordinate because of the long transmission range and varying propagation characteristics of frequencies in this region of the spectrum. In short, coordination of these applications would not provide a reasonable degree of reliability in selecting the most appropriate frequency. Accordingly, applications for frequencies in these categories should be sent directly to the Commission.

115. Two other exceptions discussed in the *Notice* involved instances in which frequency pairs are assigned on an exclusive basis. We proposed to have sent directly to the Commission applications for mobiles operating in the 470-512 MHz band and for mobile and control stations operating in the 800 MHz band where the frequency is assigned on an exclusive basis. NABER, in its comments, questioned part of this proposal. It stated that it did not interpret our proposal with respect to applications for mobiles in the 470–512 MHz band on exclusively assigned frequencies to mean that add-on users to systems licensed in this band, even those meeting our loading requirements, would be exempt from coordination. It argued that all add-on users, regardless of whether the frequency assignment is exclusive, should be coordinated.

116. As we have stressed throughout this proceeding, maintenance of a complete and up-to-date data base of frequency usage is essential for rapid, efficient and accurate frequency recommendations and licensing. Therefore, applications proposing uses that could affect other requests or recommendations must be made known to coordinators in order for them to provide a useful service. Conversely, there appears to be little, if any, purpose for coordinators to review applications that cannot have an impact on near-term frequency selections.

117. Applying this standard to the situations described above, once the mobile loading criteria have been satisfied an assignment is exclusive for that area. Therefore, other than add-on users to a multiple licensed system, the frequency cannot be assigned again in the same area. Thus, there does not appear to be a need for coordinators to immediately know if there are pending applications to increase the number of mobiles in systems that have already met loading requirements.[24] Such exact mobile loading information is not needed to determine whether an additional co-channel assignment can be made, since the possibility of other co-channel assignments will be contingent solely on distance

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[24] See Sections 90.313, 90.366, and 90.631 of the Commission's rules.

separation between systems, not on the number of mobiles in operation on existing systems. As for determining whether additional mobiles should go on the system, it is the licensee(s), not the coordinator, who determines the overall system loading. It does not make any difference whether the system is single or multiple licensed. The key here is that from an assignment standpoint the frequency is assigned on an exclusive basis and not available to another party at another location in that same geographic area. The same reasoning applies to base stations for add-on users to multiple licensed systems. We believe in each of these cases that permitting applicants with exclusive assignments to forego the frequency coordination process and to file applications directly with the Commission is consistent with our objective of reducing unnecessary regulatory burdens on licensees.[25] Accordingly, we are modifying our rules so that applications for mobiles operating in the 470-512 and 800 MHz bands, and for add-on base stations in multiple licensed systems operating in the 470-512 and 800 MHz bands where the frequency is assigned to a single system on an exclusive basis, do not require frequency coordination and can be filed directly with the Commission.[26]

118. *72-76 MHz band* — In the *Notice* we proposed to require coordination of applications specifying frequencies in the 72-76 MHz band. No comments were received on this proposal. However, upon further review of this issue we have decided not to require coordination for frequencies in this band. The specific frequencies in the 72-76 MHz band available to private land mobile entities are also available for domestic public land mobile operations licensed under Part 22. Requiring coordination of private land mobile use of this band when coordinators do not have access to data on assignments or pending requests in the domestic public land mobile service would not be useful. There

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[25] See *Report and Order*, PR Docket 84-109, 50 Fed. Reg. 6179 (February 14, 1985).

[26] A frequency is considered assigned on an exclusive basis if the system meets the Commission's loading requirements. In the case of multiple entities licensed on the same system (*i.e.* community repeater), the frequency pair is considered assigned to a single system on an exclusive basis if the combined mobile count of all licensees using that particular system meets or exceeds the loading requirements. However, if two different entities are licensed for two different systems, where taken separately the mobile loading for each system does not meet the loading standards but, if combined the mobile loading would be met, the frequency pair is not considered as assigned to a single system on an exclusive basis. In this latter case, applications for add-on base stations in multiple licensed systems and applications for mobiles must be first submitted to the frequency coordinator.

fore, requests to use the 72-76 MHz band should be filed directly with the Commission.

119. *Add-on users* — In the *Notice* we proposed to require coordination of add-on users to multiple-licensed systems, especially community repeaters.[27] Parties, like NABER and Motorola, which favor coordination of these types of applications, argued that coordination is a necessary part of maintaining an accurate and current data base. They contended that such a requirement provides the coordinator with useful information as to the activity and utilization of the frequency. On the other hand, opponents of coordination of add-on users, like NMRA, argued that once a system has been coordinated for an area there is no need to require repeated coordination just to record new users. Further, they asserted that it is the community repeater owner who determines the number and types of users on the system and what loading is appropriate. The coordinator does not independently recommend putting new users on the community repeater. Those opposed to coordination of add-on users argued that the integrity of the data base would be maintained in any event, since the information is entered into the Commission's data base and a copy of each license is given to the coordinator. If the coordinator does not wish to use the Commission's data base, it has the option of entering the information regarding add-on-users in its own data base.

120. As discussed above, we believe applications that affect the frequency selection process must be coordinated. Private land mobile frequencies are, in general, available on a shared basis. While the coordinator may not need to know the loading on a multiple licensed system at any specific instance to determine whether additional add-on users should go on the system (it is the system owner rather than the coordinator who determines this), it must have this information in order to determine if a frequency pair already used in the area can be assigned to another entity proposing operation in the same area. Therefore, we will require coordination of add-on users to multiple licensed systems when these systems operate in a shared environment (*i.e.*, when the system does not have exclusive use of the frequency). The requirement to coordinate add-on users is based primarily on the

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[27] This particular issue was the subject of PR Docket 82-226. This proceeding, however, was terminated with a statement that the subject would be covered in this proceeding. *Order Terminating Proceeding*, PR Docket 82-226, FCC 83-330, released July 25, 1983.

need to maintain up-to-date loading information to optimize future frequency recommendations.

121. *Conversions to private carrier systems* — In the *Notice* we stated that the conversion of multiple licensed systems to private carriers has resulted in problems for the Commission and coordinators. It is often not clear from an application for conversion whether the new applicant is to be substituted for previous licensees of the frequency (in which case their mobile and control stations would be purged from the data base), or whether the new applicant's requested mobile and control stations are in addition to those already licensed on the frequency. Pending the outcome of this proceeding, we suspended the licensing of private carriers except for paging systems operating on paging-only frequencies. We received very few comments on this issue. Those that did comment, however, emphasized the need for careful coordination requirements in order to maintain the accuracy of the data base.

122. We agree that the integrity of the data base is of utmost importance here. Consequently, we believe applicants for private carrier systems must provide information elaborating on the nature of the proposed system. Applications for new private carrier systems (not conversions) would follow the same procedures as other applications requiring coordination. The application, however, must clearly indicate that the proposed system is a private carrier. In order to help distinguish these systems we are adding another station classification code. A new code, FB6, will be used to designate private carriers. If mobiles are to be licensed in the name of the private carrier, the number of mobiles requested (including paging units) should be only the number that the applicant will place in service within eight months.

123. Applications involving the conversion of multiple licensed systems to private carriers will also follow this same basic licensing procedure. However, the application must also include a list of all licensees (including call signs) presently operating on the multiple licensed system together with an indication as to whether the licensees intend to obtain service from the private carrier. Current users of the multiple licensed facility intending to obtain service from the private carrier should submit their individual licenses for cancellation. These licenses (or signed statements from the licensees) must be included in the private carrier application package. In view of this decision, we believe the freeze on licensing of private carriers can be lifted simultaneously with the implementation of the requirements and procedures adopted herein.

124. *Coordination of control stations* — In the *Notice* we proposed to require coordination of all control stations regardless of antenna height. The only exception was for control stations operating in the 800 MHz band where the frequency pair is assigned on an exclusive basis. FIT was the only commenter on this issue, but limited their comments specifically to requiring coordination of all control stations in the 150-160 MHz band. Currently, applications for control stations operating below 470 MHz and above 800 MHz where the antenna height meets the "20 foot rule" of Section 90.119(a)(2)(ii) do not require coordination. Further, under our present procedure, applicants for a control station with an antenna height of 20 feet or less need only list the station address. If we require coordination, the applicant would have to complete items 1-11 on the Form 574 for each control station. The Commission would then have to check these items and input the information into the data base. We do not believe the extra work here is justified. In reviewing the record, we find that our present coordination requirements for control stations have worked well for many years without complaints from either licensees or coordinators. Accordingly, we have decided to maintain the present control station coordination requirements.

125. *Renewals/Transfers/Assignments* — Few of the entities now serving as coordinators addressed the matter of whether renewal applications or transfer/assignment applications should be submitted for coordination prior to being filed with the Commission. For example, the comments of API, UTC, NABER, APCO, and MRFAC did not express any opinion on the coordination of either renewal applications or transfer/assignment applications. SIRSA stated that, although it needs to know the ultimate disposition of renewal applications, there is no need for it to review renewal applications before they are filed with the Commission. AAR's comments indicated that license renewals should be referred to the coordinators "not necessarily for review but as a means for updating the coordinator's records." AAR stated that coordinators should not be required to review applications for assignment of licenses or transfer of control. AASHTO commented that renewals not involving any changes to the original license should not require any coordination. Neither renewal applications nor transfer/assignment applications currently require coordination and we conclude that there is no reason to change our procedures. Therefore, applications for renewal of existing authorizations, as well as applications for transfer of control and assignment of

licenses that do not involve a change in the technical parameters of the station, will be submitted directly to the Commission. Changes to an existing authorization necessitates a modification request and shall be submitted in accordance with Sections 90.135 and 90.175. A copy of the grant of an assignment will be sent to the appropriate coordinator for its use.

F. Oversight of Coordinators

126. The decisions reached in this proceeding are the product of an intense effort on the part of the coordinators, other commenters, the Commission and its staff to develop policies and procedures that will significantly improve the frequency coordination process. We have closely scrutinized the entire private land mobile licensing program in an effort to identify all of the applications for which coordination is required. The responsibilities we are assigning to the coordinators reflects, first and foremost, our desire to improve application processing and spectrum utilization. As discussed above, coordinators will be responsible for: providing coordination services on a non-discriminatory basis, reviewing applications for completeness and correctness, processing applications in order of receipt, filing coordinated applications with the Commission, handling post-licensing conflicts, responding to coordination requests on a timely basis, recommending the most appropriate frequency, handling interservice sharing requests, accessing the Commission data base when it becomes available, maintaining reasonable and uniform fees, establishing a single, national point of contact and facilitating new technologies. The decision to require coordinators to perform each of these functions was reached only after careful consideration of all relevant factors. We recognize that some coordinators would prefer a more limited role in the processing of applications. Likewise, some coordinators would prefer greater discretion in how they handle the applications. It is our judgment, however, that we must impose certain fundamental obligations on the coordinators in order to realize the improvements we think necessary. We believe the modifications we are making to the coordination process will significantly improve overall service to the public and are crucial to efficient spectrum utilization.

127. While we expect coordinators to serve the public in a responsible manner, we feel impelled to maintain oversight of the coordinators' actual performance. As noted earlier, Congress has encouraged us to do just that. The unique position in which we are placing the certified coordinators and the importance we place

on the integrity of the process makes monitoring and enforcement, if necessary, essential. Coordinators will be providing a service to applicants and will be assisting the Commission in managing the use of the private land mobile radio spectrum. We are elevating the role and importance of coordinators, but we are also imposing certain responsibilities on the coordinators in the process. Assignment of such status cannot go unfettered. We will measure the performance of coordinators against the responsibilities described. Where it appears that a coordinator is not performing its duties in a manner consistent with the public interest obligations imposed in this proceeding, the Commission may, on its own motion or at the public's request, conduct an inquiry into the coordinator's performance. While we do not foresee initiating such an inquiry on the basis of isolated complaints, we anticipate beginning an inquiry if it appears that a coordinator has established a pattern of failing to perform in accordance with the requirements adopted here or is otherwise acting contrary to the public interest. After our investigation, which may include seeking comments from the public, we will determine whether decertification of the coordinator or other action is warranted. The results of our investigation will be made public. In the event that this investigation results in the decertification of a coordinator, we will then commence action to certify a new coordinator for the particular service involved.

G. Miscellaneous Matters

128. The Aerospace and Flight Test Radio Coordinating Council (AFTRCC) filed comments urging the Commission to indicate that the coordination procedures adopted in this proceeding apply only to land mobile operations. We affirm here that this proceeding deals only with frequency coordination in the private land mobile radio services, governed by Part 90 of the Commission's Rules.

129. Motorola, in its reply comments, suggested that the Commission require all coordinators to employ identical paper flow and application tracking systems as well as standardized forms and guidelines. We agree with Motorola that an identical paper flow and application tracking system would eliminate some of the inefficiencies in the present coordination system and simplify private land mobile frequency coordination procedures. The Motorola proposal, however, was made as part of its reply comments and therefore other parties were not able to comment on the proposal. We do not believe it is appropriate to specify requirements in this area without receiving comments from the

public, especially since a number of coordinators have large investments in their present automated systems. Further, not all coordinators require the same information. Thus, while we encourage coordinators to try to standardize procedures whenever possible, we will not mandate these changes at this time. We also believe the concept of standardized forms for certain applications has merit. However, in our opinion, this is not the time to adopt such forms, particularly because we are presently reviewing the matter of application forms in the private land mobile radio services. Further, there is a pending rulemaking, RM-5125, and a *Notice of Proposed Rule Making*, PR Docket 85-302, dealing with the issues of application filing procedures and the streamlining of forms.[28]

130. An issue that has resulted in coordination problems but was not addressed in the *Notice* is the interconnection of a private land mobile radio system with the public switched telephone network (PSTN). NABER was the only entity to file comments on this issue. In order that coordinators may take into account interconnected systems when making a recommendation, NABER suggested that applicants be required to notify the coordinator if they intend to interconnect their radio system with the PSTN. We agree with NABER that coordinators should be aware of interconnected systems. Since the average transmission on a radio system interconnected with the PSTN is usually longer than if the system is not interconnected, coordinators should be aware of interconnected systems when they are making frequency recommendations. Under our current licensing procedures, applicants wishing to interconnect need only state so somewhere in the application package. Unless the coordinator reviews the entire package, including attachments, it may not be aware the system is interconnected. Licensees wishing to interconnect need only notify the Commission by letter. In such a case, the coordinator has no way of knowing a licensee is interconnecting its system with the PSTN. In order to ensure that the coordinator is aware of interconnected systems, we are adopting a new licensing code "C" to be used as part of the class of station code. Applicants wishing to have interconnect capability must list the letter "C" following the class of station code in their application. Licensees wishing to have an interconnect capability must modify their license by adding the letter "C" to their class of station code.[29]

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[28] *Notice of Proposed Rule Making*, PR Docket 85-302, released October 17, 1985, 50 Fed. Reg. 42732 (October 22, 1985).

[29] Licensees of systems presently interconnected with the PSTN should modify

131. As a result of the actions taken in this proceeding the Form 574 instructions must be modified to include instructions concerning submission of applications and the new class of station codes. We will do this in the near future.

Final Regulatory Flexibility Act Analysis

132. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

The Commission believes that its rules and policies concerning private land mobile radio frequency selection and assignments should be updated and, consequently, has modified its coordination policies and procedures by adopting changes to Parts 0, 1, and 90 of the Rules. The rules and coordination procedures are revised to refine the private land mobile frequency selection process. These changes will improve the quality of recommendations, minimize processing delays, increase spectrum efficiency, and facilitate the introduction of new technologies.

II. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

We received two comments that specifically addressed our Initial Regulatory Flexibility Analysis. Teletech Inc. (Teletech) and Professional Licensing and Liaison Services Inc. (PLLS) argued that certain parts of the Commission's proposal would have a substantial impact on their current business operations. Teletech is a commercial organization that, among other activities, prepares field studies for private land mobile radio applicants choosing not to employ the services of a frequency coordinator. Teletech has expressed concern over the elimination of the field study option. In its reply comments, it indicated that "implementation of the NPRM would effectively put Teletech and other similar entities out of business." However, we note that in its comments to the NOI in this proceeding, Teletech stated that it "is engaged in providing numerous engineering-related services to the communications user community. As a highly regarded consultant, Teletech is involved in a wide spectrum of communications activities in the broadcast, wireline telephony, interconnect, cable and radio common carrier fields." The rules being adopted

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their license (class of station code) at the next license modification or license renewal.

require an applicant to submit a technical justification if it requests a specific frequency, and also requires a technical submission by the applicant to justify a requested frequency that is denied coordination by the coordinator. While we have eliminated the field study as an alternative to obtaining a recommendation from a coordinator, we have not eliminated the opportunity for Teletech and other organizations to provide technical services to private land mobile radio applicants. PLLS stated that it is a corporation "engaged, inter alia, in the business of processing and screening for accuracy, completeness, and adequacy applications for radio licenses in the private land mobile radio service." It further stated that "(s)hould the amendment to Section 90.139 be adopted, PLLS will probably be forced to exit the business since 90–100 percent of its total revenue comes from Part 90 application processing." Under the rules being adopted here, an applicant for frequencies in the private radio services may prepare its own application or choose to utilize the services of organizations such as PLLS. Our objective is to improve coordination and application processing procedures so as to minimize the filing of defective applications and improve the Commission's speed of service to the applicant. We believe the final rules and policies contained in this document achieve this objective and, in turn, advance the interests of the end users of communication systems, many of whom are small businesses.

III. Significant alternatives considered:

The Commission considered all of the alternatives in this proceeding and considered all the timely filed comments directed to the various issues in the *Notice*. After carefully weighing all aspects of this proceeding, the Commission has adopted the most reasonable course of action under the mandate of the Communications Act of 1934, as amended.

Paperwork Reduction Act Statement

133. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980. We recognize that there are possibly some recordkeeping and reporting requirements imposed upon certified coordinators that cannot be fully defined at this time. Accordingly, when the staff fully develops the procedures for implementing the adopted coordination process, any such recordkeeping and reporting requirements that are identified will be submitted to the Office of Management and Budget for appropriate clearance.

Effective Dates

134. In order to give coordinators sufficient opportunity to meet the requirements put forth here, we are making the rules and procedures adopted effective six months from the date the summary of this item is published in the Federal Register. All applications filed after the effective date will have to follow the new coordination procedures as prescribed herein. This effective date will not apply, however, to the capability of the coordinator to access the Commission's data base. We will require coordinators to be able to access the Commission's data base three months after notice is given that such a service is available. We expect each of the certified coordinators to meet the functions and requirements in the time frame specified. Coordinators not meeting the terms of their certification are subject to Commission review and, if necessary, decertification as discussed above.

Ordering Clause

135. Accordingly, IT IS ORDERED, that effective six months after Federal Register Publication, Parts 0, 1, and 90 of the Commission's Rules, 47 C.F.R., ARE AMENDED as set forth in the attached Appendix C and this proceeding is TERMINATED. Authority for this action is found in Sections 4(i), 303, and 331 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 332.

136. For further information on this proceeding contact Eugene Thomson or Herb Zeiler, Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Appendix A & B may be seen in FCC Dockets' Branch, 1919 M Street, N.W., Washington.

APPENDIX C

Parts 0, 1, and 90 of the Commission's Rules and Regulations are amended to read:

Part 0 Commission Organization
The authority citation for Part 0 continues to read:

AUTHORITY: Sec. 5, 48 Stat. 1068 as

amended; 47 U.S.C. 155, unless otherwise noted.

Part 1 Practice and Procedure

The authority citation for Part 1 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, Implement 5 U.S.C. 552, unless otherwise noted.

Part 90 Private Land Mobile Radio Services

The authority citation for Part 90 continues to read:

AUTHORITY: Secs: 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303 unless otherwise noted.

1. Section 0.131 is amended by adding a new paragraph (g) to read as follows:

§ 0.131 Functions of the Bureau.

* * * * *

(g) Certifies frequency coordinators in the Private Land Mobile Radio Services, considers petitions seeking review of coordinator actions, and engages in oversight of coordinator actions and practices.

2. Section 1.912 is amended by adding a new paragraph (b) to read as follows:

§ 1.1912 Where applications are to be filed.

* * * * *

(b) All applications for private land mobile licenses which require frequency coordination and all correspondence relating thereto shall be first sent to the certified frequency coordinator for the radio service or frequency group concerned. After the appropriate frequency coordination, such applications shall be forwarded by the coordinator to the Federal Communications Commission, Gettysburg, PA. 17325.

3. In Section 90.7, the term of Frequency advisor is changed to Frequency coordinator and the definition is changed to read as follows:

§ 90.7 Definitions.

* * * * *

Frequency coordinator. An entity or organization that has been certified by the Commission to recommend frequencies for use by licensees in the Private Land Mobile Radio Services.

* * * * *

4. Section 90.17 is amended by revising paragraph (c)(3) to read as follows:

§ 90.17 Local Government Radio Service

* * * * *

(c) ***

(3) The maximum output power of any transmitter authorized to operate on this frequency shall not exceed 2 watts.

* * * * *

5. Section 90.53 is amended by revising the Table in paragraph (a) to remove limitation 8 where applicable, deleting and reserving paragraph (b)(8), and amending paragraph (b)(31).

§ 90.53 Frequencies available.

(a) *** * * * * *

Special Emergency Radio Service Frequency Table

Frequency or band	Class of station	Limitations
*	*	*
155.160	Base or mobile	25
155.175	do	25
155.205	do	25
155.220	do	25
155.235	do	25
155.265	do	25
155.280	do	25
155.295	do	25
155.325	do	9, 25, 29
155.340	do	10, 29
155.355	do	9, 25, 29
155.385	do	9, 25, 29
155.400	do	9, 25, 29
*	*	*

(b) ***

(8) (Reserved)

* * * * *

(31) This frequency is removed by 22.5 kHz from frequencies assigned to other radio services. Utilization of this frequency may result in, as well as be subject to, interference under certain operating conditions. In considering the use of this frequency, adjacent channel operations should be taken into consideration. If interference occurs, the licensee may be required to take the necessary steps to resolve the problem. See § 90.173(b).

* * * * *

6. Section 90.63 is amended by revising paragraphs (d) (15) to read as follows:

§ 90.63 Power Radio Service.

* * * * *

(d) ***

(15) This frequency is available on a shared basis in the Power, Petroleum, Forest Products, Manufacturers, and Telephone Maintenance Radio Services. It may be assigned only when all of the frequencies in the 450-470 MHz band allocated to the service in which the applicnt is primarily eligible are assigned within 56 km. (35 mi) of the proposed base station.

* * * * *

7. Section 90.65 is amended by revising paragraph (c) (37) to read as follows:

§ 90.65 Petroleum Radio Service.

* * * * *

(c) ***

(37) This frequency is shared with the Special Industrial Radio Service and is

available for assignment in the Petroleum Radio Service only in the states of Texas and Louisiana within 75 miles of the Gulf of Mexico and in adjacent offshore waters. Mobile relay stations will not be authorized.

* * * * *

8. Section 90.67 is amended by revising paragraph (c) (18) and (c) (29) to read as follows:

§ 90.67 Forest Products Radio Service.

* * * * *

(c) ***

(18) This frequency is available on a shared basis in the Power, Petroleum, Forest Products, Manufacturers, and Telephone Maintenance Radio Services. It may be assigned only when all of the frequencies in the 450-470 MHz band allocated to the service in which the applicant is primarily eligible are assigned within 56 km. (35 mi) of the proposed base station.

* * * * *

(29) This frequency is shared with the Taxicab and Special Industrial Radio Services. Use of this frequency is limited to stations located at least 80.5 km (50 miles) from the center of any urbanized area of 600,000 or more population (U.S. Census of Population, 1970). All operations on this frequency are limited to a maximum transmitter output power of 75 watts.

* * * * *

9. Section 90.73 is amended by revising paragraphs (d) (28), (30), (32), and (e) (4) to read as follows:

§ 90.73 Special Industrial Radio Service.

* * * * *

(d) ***

(28) This frequency is shared with the Taxicab and Forest Products Radio Services. Use of this frequency is limited to stations located at least 80.5 km (50 miles) from the center of any urbanized area of 600,000 or more population (U.S. Census of Population, 1970). All operations on this frequency are limited to a transmitter output power of 75 watts.

(29) ***

(30) This frequency is shared with other Industrial Radio Services and is available for assignment in the Special Industrial Radio Service only in the states of North Dakota, South Dakota, Iowa, Nebraska, Kansas, and Missouri beyond 50 miles from St Louis and Kansas City; Wyoming and Colorado east of Longitude 106 degrees ecept within a 50 mile radius of Denver; and Minnesota south of Latitude 47 degrees except within a 50 mile radius of St. Paul, Minnesota. The maximum transmitter output power may not exceed 110 watts.

(31) ***

(32) This frequency is shared with other Industrial Radio Services and is available for assignment in the Special Industrial Radio Service only in the States of North Dakota, South Dakota, Iowa, Nebraska, Kansas, Missouri, Colorado, and Wyoming east of Latitude 106 degrees; and Minnesota south of Latitude 47

degrees. The maximum transmitter output power may not exceed 110 watts.

* * * * *

(e) ***

(4) The following frequencies are available only in Puerto Rico and the Virgin Islands. These "Base and Mobile" and "Mobile only" frequencies are available on a shared basis in the Forestry-Conservation and Railroad Radio Services respectively. These "Mobile only" frequencies may be assigned to a control station associated with a mobile relay system if it is also assigned to the associated mobile station.

Base and mobile	Mobile only
*	*

* * * * *

10. Section 90.79 is amended by revising paragraphs (d) (4) and (d) (13) to read as follows:

§ 90.79 Manufacturers Radio Service.

* * * * *

(d) ***

(4) This frequency is available on a shared basis in the Manufacturers, Special Industrial and Railroad Radio Services.

* * * * *

(13) This frequency is available on a shared basis in the Power, Petroleum, Forest Products, Manufacturers, and Telephone Maintenance Radio Services. It may be assigned only when all of the frequencies in the 450–470 MHz band allocated to the service in which the applicant is primarily eligible are assigned within 56 km. (35 mi) of the proposed base station.

11. Section 90.81 is amended by revising paragraph (d) (4) to read as follows:

§ 90.81 Telephone Maintenance Radio Service

* * * * *

(d) ***

(4) This frequency is available on a shared basis in the Power, Petroleum, Forest Products, Manufacturers, and Telephone Maintenance Radio Services. Except for assignments made to non-wire line radiocommunications common carriers authorized in the Point-to-Point Microwave Radio Service under Part 21 it may be assigned only when all of the base and mobile frequencies in the 450–470 MHz band for which the applicant is primarily eligible are assigned within 56 km. (35 mi.) of the proposed base station.

* * * * *

12. Section 90.89 is amended by revising paragraph (c) (10) to read as follows:

§ 90.89 Motor Carrier Radio Service.

* * * * *

(c) ***

(10) This frequency is shared in the Motor Carrier and Railroad Radio Services.

It may be assigned only when all of the frequencies in the 450-470 MHz band allocated to the service in which the applicant is primarily eligible are assigned within 56 km. (35 mi.) of the proposed base station.

* * * * *

13. Section 90.91 is amended by revising paragraph (c) (10) to read as follows:

§ 90.91 Railroad Radio Service

* * * * *

(c) ***

(10) This frequency is shared in the Motor Carrier and Railroad Radio Services. It may be assigned only when all of the frequencies in the 450-470 MHz band allocated to the service in which the applicant is primarily eligible are assigned within 56 km. (35 mi.) of the proposed base station.

* * * * *

14. Section 90.93 is amended by revising paragraph (c) (11) to read as follows:

§ 90.93 Taxicab Radio Service.

* * * * *

(c) ***

(11) This frequency is shared with the Forest Products and Special Industrial Radio Services. Use of this frequency is limited to stations located at least 80.5 km. (50 miles) from the center of any urbanized area of 600,000 or more population (U.S. Census of Population, 1970).

* * * * *

15. Section 90.111 is amended to read as follows:

§ 90.111 Scope.

This subpart contains the procedures and requirements for the submission or filing of applications for authority to operate radio facilities under this part. The procedures described are those utilized by the Commission after receiving filed applications.

* * * * *

16. Section 90.119 is amended by revising subparagraph (a) (2) (ii) to read as follows:

§ 90.119 Application forms.

* * * * *

(a) ***

(2) ***

(ii) If the control station(s) will operate on the same frequency as the mobile station, and if the height of the control station(s) antenna(s) will not exceed 6.1 meters (20 feet) above ground or an existing man-made structure (other than an antenna structure), there is no limit on the number of such stations which may be authorized. Items 1 through 5 of Form 574 shall be completed showing the frequency, the station class, the total number of control stations, the emission, and the output power of the highest powererd control station. Applicants for all control stations in the 470-512 MHz band must furnish the information requested in Items 1-11 of Form 574.

* * * *

17. Section 90.127 is amended by revising the section heading and paragraph (a) to read as follows:

§ 90.127 Submission and filing of applications.

(a) All applications for station authorizations which require frequency coordination in accordance with § 90.175 and any correspondence relating thereto, must initially be submitted to the certified frequency coordinator for the radio service or frequency group involved. After the completion of frequency coordination, these applications shall be forwarded by the coordinator to the Federal Communications Commission, Gettysburg, Pennsylvania, 17325. All other applications shall be filed by the applicant directly with the Federal Communications Commission, Gettysburg, PA, 17325. A listing of the certified frequency coordinators may be obtained from the Federal Communications Commission, Gettysburg, PA 17325.

* * * * *

18. In section 90.129, the introductory paragraph is revised to read as follows:

§ 90.129 Supplemental information to be routinely submitted with applications.

Each application received by the Commission must be accompanied by the applicable information listed below:

* * * * *

19. Section 90.135 is revised to read as follows:

§ 90.135 Modification of license.

(a) The following changes in authorized stations require an application for modification of license:

(1) Change in frequency.

(2) Change in the type of emission.

(3) Change in power from that authorized.

(4) Change in antenna height from that authorized.

(5) Change in the location or number of base stations, fixed, control, or mobile transmitters from that authorized, including area of mobile operations.

(6) Change in the class of a land station, including changing from multiple licensed to cooperative use, and from shared to unshared use.

(7) Any change in ownership, control, or corporate structure.

(b) The following changes in authorized stations do not require an application for modification of license.

(1) Change in mailing address of licensee.

(2) Change of name only of licensee, without changes in ownership, control, or corporate structure.

(3) Change in the number and location of station control points or of control

stations operating below 470 or above 800 MHz meeting the requirements of § 90.119(a)(2)(ii).

(4) Change in the number of mobile units operated by Radiolocation Service licensees.

(5) Any other changes not listed in paragraph (a) of this section.

(c) Unless specifically exempted in § 90.175, requests for modifications listed in paragraph (a) of this section must be submitted on Form 574 to the applicable frequency coordinator.

(d) In case of a change listed in paragraph (b)(1) or (b)(2) of this section, the licensee must notify the Commission immediately. Notification may be by Form 405-A or by letter. The letter must contain the name and address of the licensee as they appear in the Commission's records, the new name or address, the call signs and classes of all radio stations authorized to the licensee under this part and the radio service in which each station is authorized. The completed and signed Form 405-A or the letter must be sent to: Federal Communication Commission, Gettysburg, Pennsylvania 17325. Licensees whose licenses are due for renewal and who have received the renewal Form 574-R in the mail from the Commission must use the appopriate boxes on that form to notify the Commission of a change listed in paragraph (b)(1) or (b)(2) of this section.

(e) In the case of a change listed in paragraphs (b)(3), (b)(4), and (b)(5) of this section, the licensee must notify the Commission within 30 days of the change. The notice may be filed on FCC Form 574 or may be contained in a letter specifying the nature of the change, the name and address of the licensee as appearing on Commission records, and the call sign, class, and radio service of the station. The notice must be sent to: Federal Communications Commission, Gettysburg, Pennsylvania 17325.

* * * * *

20. Section 90.137 is amended by revising paragraph (a) and adding subparagraph (a)(3) to read as follows:

§ 90.137 Applications for operation at temporary locations.

(a) An application for authority to operate a base or a fixed transmitter at temporary locations shall be filed in accordance with the following:

(1) ***

(2) ***

(3) Applications for operation at temporary locations exceeding 180 days must be accompanied by evidence of frequency coordination.

* * * * *

21. Section 90.139 is amended by revising the section heading and paragraph (b) as follows:

§ 90.139 Commission processing of applications.

* * * * *

(b) Applications which are incomplete with respect to answers, supplementary statements, execution, or other matters of a formal character shall be deemed defective and may be dismissed. In addition, if an applicant is requested to file any additional documents or information not included in the prescribed application form, failure to comply with such request will render the application defective and it may be dismissed. Applications will also be deemed to be defective and be dismissed in the following cases:

(1) Statutory disqualification of applicant;

(2) Proposed use or purpose of station would be unlawful;

(3) Requested frequency is not allocated for assignment for the service proposed.

* * * * *

22. Section 90.141 is amended to read as follows:

§ 90.141 Resubmitted applications.

Any application received by the Commission for frequencies below 470 MHz which has been returned by the Commission to the applicant for correction will be processed in its original position in the processing line if it is resubmitted and received by the Commission within 60 days from the date on which it was returned to the applicant. Otherwise it will be treated as a new application for the purpose of processing considerations. An application received by the Commission for frequencies above 470 MHz which has been returned by the Commission to the applicant will be processed in its original position in the processing line if it is resubmitted and received by the Commission within 30 days (45 days outside the continental United States) from the date on which it was returned to the applicant. Otherwise it will be treated as a new application for the purpose of processing considerations.

23. Section 90.145 is amended by adding a new paragraph (c) to read as follows:

§ 90.145 Special temporary authority.

* * * * *

(c) Requests for special temporary authority to operate for periods exceeding 180 days require evidence of frequency coordination. Requests for shorter periods do not require coordination and, if granted will be authorized on a secondary, non-interference basis.

24. In Section 90.151, paragraphs (a) and (d) are amended to read as follows:

§ 90.151 Requests for waiver.

(a) Requests for waiver of the rules in this part shall state the nature of the waiver or exception desired, and set forth reasons in support thereof including a showing that unique circumstances are involved and that there is no reasonable alternative solution within existing rules. When related to a specific application the submission and filing procedures of § 90.127 also apply.

* * * * *

(d) Requests for waiver of the rules not related to a specific application shall be submitted to the Federal Communications Commission, Gettysburg, PA 17325.

25. Section 90.159 is revised to read:

§ 90.159 Temporary permit.

An applicant for a private land mobile station license utilizing an already authorized facility may operate the radio station(s) for a period of up to 180 days under a temporary permit evidenced by a properly executed temporary license certificate (Form 572) after submitting or filing a formal application for station license in accordance with § 90.127, provided that all the antennas employed by control stations are twenty feet or less above ground or twenty feet or less above a man-made structure other than an antenna tower to which it is affixed. When required by § 90.175, applications must be accompanied by evidence of frequency coordination. The temporary operation of stations, other than mobile stations within the Canadian coordination zone is limited to stations with maximum of 5 watts effective radiated power and a maximum antenna height of 6.1 meters (20 ft.)) above average terrain.

26. Section 90.175 is revised to read as follows:

§ 90.175 Frequency coordination requirements.

Except for applications listed in paragraph (f) of this section, each application for a new frequency assignment, for a change in existing facilities as listed in § 90.135(a), for a reinstatement of an authorization expired for more than 6 months, or for operation at temporary locations in accordance with § 90.137, must include a showing of frequency coordination as set forth below. When frequencies are shared by more than one service, concurrence must be obtained from the other applicable certified coordinators.

(a) For frequencies between 25 and 470 MHz:

A statement from the applicable frequency coordinator recommending the most appropriate frequency. The coordinator's recommendation may appropriately include comments on technical factors such as power, antenna height and gain, terrain, and other factors which may serve to mitigate potential interference. Except for narrowband operations, the coordinator must not recommend any adjacent channel frequency 15 kHz removed to existing stations which would result in a separation of less than 10 miles, or 7 miles in the Taxicab Radio Service. If the frequency recommended is in the 150-170 MHz band, and is 17.5 kHz or less removed from a frequency which is available to another radio service, the coordinator's statement must show that approval has been received from the coordinator for the other service. Coordination with another service is not required, however, for narrowband assignments more than 5 kHz removed from other narrowband assignments.

(b) For frequencies between 470 and 512 MHz and 806-821/851-866 MHz.

A statement from the applicable coordinator recommending specific frequencies which are available for assignment in accordance with the loading standards and mileage separations applicable to the specific radio service or category of user involved.

(c) For frequencies in the 929-930 MHz band.

A statement from the coordinator recommending the most appropriate frequency.

(d) Any recommendation submitted in accordance with paragraphs (a), (b), or (c) of this section is advisory in character and is not an assurance that the Commission will grant a license for operation on that frequency. Therefore, applicants are strongly advised not to purchase radio equipment operating on specific frequencies until a valid authorization has been obtained from the Commission.

(e) Applications for facilities near the Canadian border north of line A or east of line C in Alaska may require coordination with the Canadian government. See

Section 1.955 of this chapter.

(f) The following applications need not be accompanied by evidence of frequency coordination:

(1) Applications for frequencies below 25 MHz.

(2) Applications for a Federal Government frequency.

(3) Applications for frequencies in the 72–76, 216–220, and 1427–1435 MHz bands.

(4) Applications for a frequency to be used for developmental purposes.

(5) Applications in the Special Industrial Radio Service or the Business Radio Service requesting a frequency designated for itinerant operation only.

(6) Applications in the Radiolocation Service.

(7) Application for 800 MHz trunked frequencies listed in § 90.362 of this part.

(8) Applications for 800 MHz SMRS pool frequencies listed in § 90.617(d) and § 90.619.

(9) Applications indicating license assignments such as change in ownership, control or corporate structure if there is no change in technical parameters.

(10) Applications for mobile stations operating in the 470–512 and 800 MHz bands if the frequency pair is assigned to a single system on an exclusive basis in the proposed area of operation.

(11) Applications for add-on base stations in multiple licensed systems operating in the 470–512 and 800 MHz bands if the frequency pair is assigned to a single system on an exclusive basis.

(12) Applications for control stations operating below 470 or above 800 MHz and meeting the requirements of § 90.119(a)(2)(ii).

27. Section 90.176 is amended by revising paragraphs (a)(1), (a)(3), (b)(1), and (b)(3) to read as follows:

§ 90.176 Interservice sharing of frequencies in the 150–174 and 450–470 MHz bands.

(a) ***

(1) A determination by the applicable frequency coordinator that there are not satisfactory frequencies available within the applicant's own radio service in the area of desired operation;

* * * * *

(3) A statement from the frequency coordinator having responsibility for coordination in the radio service or group in which the frequency is assigned concurring to its assignment in the manner requested. In cases where concurrence is not given the coordinator must provide an explanation of why the requested sharing is inappropriate.

* * * * *

(b) ***

(1) A determination by the applicable frequency coordinator that there are no satisfactory frequencies available within the applicant's own radio service in the area of desired operation;

* * * * *

(3) A statement from the frequency coordinator having responsibility for coordination in the radio service or group in which the frequency in question is assigned concurring in its assignment in the manner proposed. In cases where concurrence cannot be given the coordinator must provide an explanation of why sharing is inappropriate.

* * * * *

28. In section 90.237, the introductory paragraph is revised to read as follows:

§ 90.237 Interim provisions for operations of radioteleprinter and radiofacsimilie devices.

These provisions authorize and govern the use of radioteleprinter and radiofacsimle devices for base station use (other than on mobile-only or paging-only frequencies) in the radio services (except in the Radiolocation and Special Emergency Radio Services) in this part.

* * * * *

29. Section 90.477 is amended by revising paragraph (a) to read as follows:

§ 90.477 Interconnected systems.

(a) Applicants for new land stations to be interconnected with the public switched telephone network must indicate on their applications (class of station code) that their stations will be interconnected. Licensees of land stations that are not interconnected may interconnect their stations with the public switched telephone network only after modifying their license. See § 90.135. In all cases a detailed description of how interconnection is accomplished must be maintained by licensees as part of their station records. See § 90.433.

* * * * *

30. Section 90.494 is amended by revising paragraph (b) to read as follows:

§ 90.494 One-way paging operations in the 929-930 MHz band.

* * * * *

(b) All applications for these frequencies must comply with the frequency coordination requirements of 90.175(c).

* * * * *

31. Section 90.605 is revised to read as follows:

§ 90.605 Forms to be used.

Applications for conventional and trunked radio facilities must be prepared on FCC Forms 574 and 574A and must be submitted or filed in accordance with § 90.127.

* * * * *

32. Section 90.607 is amended by adding a new paragraph (e) to read as follows:

§ 90.607 Supplemental information to be furnished by applicants for facilities under this subpart.

* * * * *

(e) Except for applicants requesting frequencies in the SMRS category listed in

§ 90.617(d) and § 90.619, all applicants for frequencies governed by this subpart must comply with the frequency coordination requirements of § 90.175(b).

33. Section 90.621 is amended by revising paragraphs (a) and (c) to read as follows:

§ 90.621 Selection and assignment of frequencies.

(a) Applications in the Public Safety/Special Emergency, Industrial/Land Transportation, and Business categories and for frequencies in the conventional category must specify the frequencies on which the proposed system will operate pursuant to a recommendation by the applicable frequency coordinator. Applicants for SMRS trunked frequencies may either request specific frequencies by including in their applications justification for the frequencies requested or may request the Commission to select frequencies for the system.

* * * * *

(c) Trunked systems authorized on frequencies in the Public Safety, Industrial/Land Transportation, and Business Categories will be protected solely on the basis of predicted contours. Coordinators will attempt to provide a 40 dBu contour and to limit co-channel interference levels to 30 dBu over an applicant's requested service area. This would result in a mileage separation of 70 miles for typical system parameters. Separations will be less than 70 miles where the requested service areas, terrain or other factors warrant reduction. In the event that the separation is less than 70 miles, the coordinator must indicate that the protection criteria have been preserved or that the affected licensees have agreed in writing to the proposed system. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account.

* * * * *

34. Section 90.657 is revised to read as follows:

§ 90.657 Temporary permit.

An applicant for a Subpart S radio station license utilizing an already authorized facility may operate the radio station(s) for a period of up to 180 days under a temporary permit evidenced by a properly executed certification of FCC Form 572 after filing a formal application for station license together with evidence of frequency coordination (when required), provided that the antenna(s) employed by the control station(s) is (are) twenty feet or less above ground or twenty feet or less above a man-made structure other than an antenna tower to which it is affixed.

* * * * *

Application, Dismissal of
Application, Incomplete

Application dismissed as incomplete where applicant failed to submit information required to determine its proposed service contours.

—*Royce International B/cing Co.*
MM Docket No. 83-65

FCC 86-166

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

ROYCE INTERNATIONAL BROADCASTING COMPANY Citrus Heights, California	MM DOCKET NO. 83-65 File No. BPCT-820824KH
PONCE-NICASIO BROADCASTING, A LIMITED PARTNERSHIP Sacramento, California	MM DOCKET NO. 83-68 File No. BPCT-820824KN

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1986; Released: April 17, 1986

BY THE COMMISSION:

1. This comparative proceeding involves mutually exclusive applications for new UHF television facilities in the Sacramento-Citrus Heights, California, market. The application of Royce International Broadcasting Company (Royce) was dismissed by Order, FCC 83M-1951, released June 15, 1983, *affirmed, Trefoil Broadcasting Co., Inc.*, 94 FCC 2d 928 (Rev. Bd. 1983), *review denied, Royce International Broadcasting Company*, FCC 84-588,

released November 24, 1984.[1] Royce appealed the denial of review and the dismissal of its application to the Court of Appeals.[2] Now before the Commission are a Petition for Partial Reconsideration, filed December 31, 1984, by Ponce-Nicasio Broadcasting (Ponce-Nicasio); an Opposition filed January 22, 1985, by Royce; and a Reply, filed February 4, 1985, by Ponce-Nicasio. In its Petition for Partial Reconsideration, Ponce-Nicasio seeks to establish additional support for the dismissal of Royce's application.

2. On October 20, 1982, the "B" cut-off date for the Sacramento-Citrus Heights market, Royce amended its application to specify a new transmitter site. Both Royce's original application and the October 20 "B" amendment, failed to include engineering data required by FCC Form 301, Sections V-C and V-G, which is needed to compute Royce's proposed service contours. The *Hearing Designation Order*, 48 Fed. Reg. 7496, published February 22, 1983, directed Royce to file the missing engineering data with the ALJ by March 24, 1983. Royce failed to file the missing data with the ALJ in a timely manner.[3] The ALJ and the Review Board dismissed Royce's application. They found that the October 20 "B" amendment resulted in a change of 50% or more of the area within Royce's proposed Grade B service contour and effected a major change requiring the removal of its application from hearing, pursuant to Section 73.3572 of the Rules;[4] and that Royce failed to establish good cause for its failure to file the requested data with the ALJ in a timely manner.

3. In light of Royce's lack of diligence in the submission of the information requested by the Designation Order, the Commission agreed that Royce's proposed amendment had been properly rejected because of Royce's failure to establish good cause for its

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[1] By *Order*, FCC 84R-34, released May 11, 1984, the Review Board approved a settlement agreement, granted Ponce-Nicasio's application, and dismissed the remaining applications.

[2] D.C. Cir., Case No. 84-1639.

[3] Royce has never amended its application to furnish the Sections V-C and V-G data for its original proposal.

[4] Section 73.3572(b) formerly provided that a new file number would be assigned to an application for a new station when it was amended so as to effect a major change, which included engineering changes resulting in a gain or loss of 50% or more of the area within the Grade B contour of the station. In the *First Report and Order*, (Docket No. 83-1377), 56 RR 2d 941, released published August 10, 1984, Section 73.3572 was amended to change the definiton of minor amendments to encompass all changes in power, antenna location or antenna height, without regard to their effect on coverage area. Royce's amendments, which were filed prior to the modification of Section 73.3572(b), are being processed under the former Rule. 56 RR 2d at 946, n. 6.

acceptance. Under these circumstances, the Commission affirmed the dismissal of Royce's application, pursuant to Section 73.3568(b) of the Commission's Rules, because Royce had not properly responded to the Designation Order's request for information. However, noting the discrepancies between Royce's and Ponce-Nicasio's calculations of Royce's proposed service contours, the Commission made its own calculations, and found that the October 20 "B" amendment specifying a new transmitter site, was not a major change. Ponce-Nicasio argues, *inter alia*, that it cannot determine if the Commission's calculations were predicated on proper baseline information, and that the Commission erred because Royce never furnished the technical data omitted from its application which is needed to compute its service contours. In response Royce contends that the Commission found there was no major change and that Ponce Nicasio has failed to present new arguments warranting reconsideration.

4. When we initially considered this matter, we addressed the issue of whether Royce's October 20, 1982 amendment effected a net change in Grade B coverage of 50% or more because it was a principal ground of the rulings below. Our independent computations of coverage using ERP (effective radiated power) and HAAT (height above average terrain) submitted in support of Royce's May 20, 1983 amendment, indicated that the October 20, 1982 amendment was not a major change.[5] However, we have reviewed Royce's filings in light of Ponce-Nicasio's present objections, and we find that there are omissions and errors in the data submitted which call into question the validity of the ERP data used in the Commission's computations and which render it impossible to calculate Royce's service contours with reasonable certainty.

5. Royce's application filed August 25, 1982, did not contain the ERP values required to calculate its predicted coverage or provide a map showing its predicted coverage contours. Moreover, we can not determine the effective radiated power on each radial with certainty because of ambiguities converning the orientation of Royce's directional antenna. That proposed antenna had two major lobes. Royce specified an orientation for only one lobe without identifying which one. In addition, Royce concluded in its application that the antenna depression angle was such that the

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[5] Although coverage is a function of both antenna height and radiated power, the effective radiated power values submitted by Royce were not questioned. Both the Broadcast Bureau and the Review Board relied on Royce's data in finding that its amendment was a major change. Thus, we initially accepted Royce's effective radiated power figures for its original and amended application. As we explain, *infra*, we now find that such acceptance was in error.

vertically radiated field was within 90% of maximum on all radials. This conclusion concerning field strength is in error. The results of our own calculations of field strength, using the method set forth in Section 73.684(c)(1) and the data provided by Royce, was always less than 90%.[6]

6. Although Royce's October 20, 1982 amendment specified ERP values used to calculate its proposed contours from the new site, it subsequently acknowledged that the October 20 values were in error, and it submitted different ERP values supporting its May 20, 1983 amendment. Moreover, we were unable to compute our own ERP values for the October 20 amended proposal because Royce's submission included conflicting data. Thus, although the antenna pattern filed with the amendment showed a 0% null fill, the narrative claimed the antenna would have a 10% null fill. Royce also erroneously claimed that the antenna depression angle was such that the vertically radiated field was within 90% of maximum, while the results of our calculations using the method set forth in Section 73.684(c)(1) and the date provided by Royce, was always less than 90%.

7. Royce's filings provided the ERP figures utilized by the Commission to compute Royce's original and proposed contours. Royce, however, did not describe how it computed those ERP figures, and using the facility data in Royce's filings we were unable to either duplicate or reasonably approximate Royce's ERP values in a manner consistent with Section 73.681 of the Rules.[7] Moreover, the May 20 amendment did not correct the other, previously noted deficiencies in Royce's application. Royce failed to specify its antenna orientation, or provide antenna patterns or vertical field values which could be used to accurately compute the ERP values.

8. Royce's application thus did not provide sufficient information to determine its proposed service contours. After this proceeding was designated for hearing, Royce was afforded adequate opportunity to provide the data missing from its application. Even if we consider Royce's post designation submis-

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[6] Section 73.684(c)(2) of the Rules provides that in predicting coverage:

> In cases where the relative field strength at the depression angle . . . is 90% or more of the maximum field strength developed in the vertical plane containing the pertaining radial, the maximum radiation shall be used.

Thus, Royce, erroneously calculated its service contours using 100% of the maximum strength on each radial, when in fact a strength below 90% of maximum should have been used.

[7] Section 73.681 of the Rules defines ERP as "the product of the antenna input power and the antenna power gain."

sions, the data is inadequate to determine with certainty whether Royce's amendment resulted in a major change. Accordingly, our finding that Royce's October 20, 1982 amendment did not effectuate a major change will be vacated. The public interest does not require us to hold a mutually exclusive application, ready and able to provide a new service, in abeyance in order to offer Royce an additional opportunity to file the missing data. We, therefore, find that Royce's application is incomplete and it will be dismissed for the separate and distinct reason that it lacks the data required to ascertain its proposed signal contours and to evaluate its technical proposal.

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Partial Reconsideration, filed December 21, 1984, by Ponce-Nicasio Broadcasting IS GRANTED to the extent that our previous Memorandum Opinion and Order, FCC 84-588, released November 29, 1984, IS MODIFIED as indicated herein, and in all other respects, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Agreement, Between Applicants
Reconsideration
Settlement

Requirement that applicant sell low power TV station deleted pursuant to settlement agreement where no evidence that applicant never intended to honor pledge to dismiss TV application. Reconsideration of action imposing divestiture condition not required since grant following settlement agreement not based on comparative evaluation of competing applicants.

— *Ruarch Associates*
MM Docket No. 83-843

FCC 86-130

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
Arthur D. Stamler and Virginia I. Stamler d/b/a RUARCH ASSOCIATES Woodstock, Virginia	MM DOCKET NO. 83-843 File No. BPH-820331AH
ALL KOUNTRY MUSIC BROADCASTERS, A PARTNERSHIP Edinburg, Virginia	MM DOCKET NO. 83-845 File No. BPH-820908AH
For Construction Permit For a New FM Station	

ORDER

Adopted: March 26, 1986; Released: March 28, 1986

BY THE COMMISSION:

1. The above captioned applications are mutually exclusive. By Memorandum Opinion and Order, FCC 85-503, 101 FCC 2d 1358,

released September 18, 1985, the Commission denied review of a final Review Board Decision (FCC 84R-73, 99 FCC 2d 338, released April 17, 1984) that granted the application for a new FM station in Woodstock, Virginia filed by Ruarch Associates (Ruarch) and denied the competing application for a new FM station in Edinburg, Virginia filed by All Kountry Music Broadcasters (All Kountry). After the Review Board's Decision Ruarch's pending application for a low power television station in Woodstock was granted. Since Ruarch had promised to dismiss the low power television application if its FM application was granted, the Commission made the grant of the construction permit to Ruarch "subject to the condition that Ruarch Associates divests itself of all interest in the permit (No. GL-85-7) to construct and operate a low powaer television facility in Woodstock, Virginia." The low power station is now fully operational. All Kountry filed a Notice of Appeal in the United States Court of Appeals for the District of Columbia Circuit on October 16, 1985. By its Order of January 2, 1986 the court remanded this proceeding to the Commission for consideration of a settlement agreement between All Kountry and Ruarch.

2. On December 23, 1985 All Kountry and Ruarch Associates filed a Joint Request for Approval of Settlement Agreement. A Supplement to the Joint Request was filed on December 31, 1985. The parties request that the Commission approve the attached settlement agreement, dismiss All Kountry's application, and grant Ruarch's application without the condition that it divest itself of its low power television station. Under the terms of the settlement agreement Ruarch will pay All Kountry the sum of $32,500.00 and All Kountry will dismiss its application.

3. The Joint Request for Approval of Settlement Agreement complies fully with the provisions of Section 311(c) of the Communications Act, as amended, and Section 73.3525 of the Commission's Rules which govern settlement agreements. The Joint Request states that approval of the settlement agreement will serve the public interest because the dismissal of All Kountry's application will terminate this proceeding, will conserve the resources of the Commission, the court and the parties, and will expedite the institution of a new FM broadcast station in Woodstock, Virginia. In addition, the parties state that grant of the Joint Request would not unduly impede the achievement of a fair, efficient and equitable distribution of radio service since All Kountry did not receive any Section 307(b) preference for its proposal to serve Edinburg. The parties have submitted a copy of

the settlement agreement and statements under penalty of perjury from each party to the settlement agreement. The statements certify that their applications were not filed for the purpose of reaching or carrying out a settlement agreement.

4. Grant of Ruarch's application without the condition that it dispose of the low power television station in Woodstock, Virginia will also serve the public interest. Although diversification is an important objective in choosing among qualified applicants for a broadcast station,[1] it is a purely comparative factor, and the Commission's multiple ownership rules do not prohibit a licensee from owning a low power television station and an FM station in the same community.[2] Since an unconditional grant of Ruarch's application would be based upon the dismissal of All Kountry's mutually exclusive application without regard to the previous comparative evaluation of the applicants, approval of the settlement agreement in no way compromises the Commission's diversification policy. To the extent that *Alexander S. Klein, Jr.*, 88 FCC 2d 583, 586 & n.9 (1981), suggests that we must reconsider the merits of our September 18, 1985 Memorandum Opinion and Order in order to make an unconditional grant pursuant to a settlement agreement, it ignores the fact that because the parties have agreed to settle the case, we are no longer faced with a comparative choice of applicants and the basis for a grant is fundamentally changed.

5. *Klein* also indicates that the Commission will not entertain requests for grant without divestiture pursuant to negotiated settlement because this deprives the public of any benefit from the comparative analysis that culminated in the divestiture condition and permits the winning applicant to unfairly benefit from its divestiture proposal. For the reasons that follow we find these concerns to be largely misplaced, and we overrule *Klein*. In this case there is no evidence that Ruarch intended to avoid its commitment to dismiss its low power television station if its FM application was granted. Absent such evidence, an unconditional grant pursuant to a settlement agreement does not jeopardize the integrity of the Commission's adjudicatory process. Settlement, even at this late stage of a comparative proceeding, will expedite service to the public and conserve the resources of the parties, the court and the Commission. Unless it appears that the applicant never intended to honor its divestiture commitment, the public

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[1] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965).

[2] *Low Power Television Service*, 51 RR 2d 476, 513–17 (1982).

interest is better served by approving the settlement agreement, making a grant without divestiture condition to a fully qualified applicant and terminating the proceeding than by insisting that a condition imposed in the context of a comparative proceeding remain intact even though the parties have entered into a settlement agreement.[3]

6. ACCORDINGLY, IT IS ORDERED, That the Joint Request for Approval of Settlement Agreement, filed on December 23, 1985, and supplemented on December 31, 1985, by Ruarch Associates and All Kountry Music Broadcasters IS GRANTED; that the settlement agreement IS APPROVED; that the application of All Kountry Music Broadcasters (File No. BPH-820908AH) IS DISMISSED; and that the application of Ruarch Associates (File No. BPH-820331AH) IS GRANTED without the previously specified condition that it divest itself of the low power television station (WA10AZ) that it owns and operates on Channel 10 in Woodstock, Virginia.

7. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[3] We do not believe that it is necessary to delete the divestiture condition from, or otherwise vacate, our September 18, 1985 Memorandum Opinion and Order in favor of Ruarch. Since the unconditional grant to Ruarch is based upon the dismissal of All Kountry's application and not upon a comparative evaluation of the applicants, approval of the Joint Request does not affect the rationale of our September 18, 1985 Memorandum Opinion and Order, and it would be valid precedent in future cases involving a promise to divest. Moreover, a vacation order is not necessary to preserve the rights of the parties. Since the propriety of the divestiture condition was not challenged in court and would never have been reviewed, the Memorandum Opinion and Order need not be vacated. *Compare Constance J. Wodlinger*, FCC 85-335, released July 10, 1985, where the Commission vacated an Initial Decision that contained findings which were adverse to one party and which had been challenged on appeal. *Cf. United States* v. *Munsingwear*, 350 U.S. 36 (1950); *Boston Community Committee, Minority Caucus* v. *FCC*, 509 F.2d 516 (D.C. Cir. 1975).

Dismissal of Application, Appeal From, Denied
Ownership Change, Substantial
Partnership, Limited, Bona Fides

Review Board denies appeal from ALJ's dismissal of applicant which had amended its application on B cutoff date to report transfer of 50% of voting control to a new general partner, who was not a party to the original application. No significant offsetting equities which would warrant providing the applicant a final opportunity to eviscerate through amendment its substantial ownership change were present. In Separate Statement, Member Blumenthal raises question whether "general" partners equity is too small to treat them as having *de facto* control.

—*Tequesta TV, Inc.*
MM Docket No. 85-60

FCC 86R-22

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	MM DOCKET NO. 85-60
TEQUESTA TELEVISION, INC.	FILE NO. BPCT-841129KE
Ruth Sperling and Bonita Gooch, *et al.* d/b/a TEQUESTA TELEVISION PARTNERS LIMITED PARTNERSHIP	FILE NO. BPCT-841129KI
TRIPLE J. PROPERTIES, INC.	FILE NO. BPCT-841129KL
ZEPHYR BROADCASTING CORPORATION	FILE NO. BPCT-841129KP
MARTIN TELECOMMUNICATIONS, INC.	FILE NO. BPCT-841129KR

G & I LTD.	FILE NO. BPCT-841129KS
SPIRIT BROADCASTING CORPORATION	FILE NO. BPCT-841129KT
RODRIGUEZ-BARNETT AND ASSOCIATES, LTD.	FILE NO. BPCT-841129KU
For Construction Permit Tequesta, Florida	

MEMORANDUM OPINION AND ORDER

Adopted: April 7, 1986; Released: April 11, 1986

By the Review Board: Board Member Blumenthal Issuing Separate Statement.

1. The Review Board has under consideration an appeal filed February 7, 1986 by Tequesta Television Partners Limited Partnership (TTP) from a ruling of Administrative Law Judge Edward J. Kuhlmann (ALJ), *Memorandum Opinion and Order*, FCC 86M-382, released January 31, 1986 (Order), dismissing TTP's application for a construction permit for a new television broadcast facility at Tequesta, Florida, because of a substantial change (50%) in TTP's controlling ownership. Tequesta Television, Inc. (Tequesta TV), Zephyr Broadcasting Corporation (Zephyr), and Triple J. Properties, Inc. (Triple J), whose applications are mutually-exclusive with that of TTP, oppose the appeal. We agree with the ALJ that TTP's amendment filed January 16, 1985 caused the transfer of 50% of the voting control of TTP to Bonita Gooch, a person who was not a party to the original application, thus requiring return of TTP's application to the processing line for assignment of a new file number pursuant to 47 CFR § 73.3572(b). Therefore, we affirm the ALJ's Order dismissing TTP's application.

2. *Background.* In its original application filed November 29, 1984, TTP's owners were specified as William H. Dilday, Jr., a general partner and 10.0% equity owner; Ruth Sperling, a general

partner and 2.5% equity owner; and Thomas F. Carney, Jr., sole limited partner and 87.5% owner. Exhibit 2 to TTP's application specified that "each of the general partners has an equal voice in the affairs and business of the partnership." On January 16, 1985, the "B" cut-off date in this proceeding, TTP amended its application as a matter of right, pursuant to 47 CFR § 73.3522(a)(2), to reflect a new ownership structure as follows: Ms. Sperling, a general partner and 2.5% owner; Bonita Gooch, a general partner and 2.5% owner; Mr. Carney, sole limited partner and 95.0% owner. Mr. Dilday was deleted from the list of partners/owners. The amendment did not clearly delineate the extent of *actual* control each partner would exert over partnership affairs, but did state that TTP's "application remains unchanged in all other respects." However, in the Order under appeal herein, the ALJ found that TTP did not fully disclose how control would be exercised by the partnership over the proposed facility until the actual hearing proceeding, when it became clear that the two general partners would have equal and total voting control over partnership affairs and that the limited partner would be passive, maintaining a right to vote only in matters involving extraordinary partnership acts. Order, para. 10; TTP Exh. 1; Triple J Exh. 6 at 10, 21 *et seq.*; Tr. 349–355 (Carney testimony), 398–399, 411–413 (Sperling testimony), 622 (Gooch testimony).

3. On October 2, 1985, within two weeks after the close of the hearing record, Martin Telecommunications, Inc. (Martin) filed a motion to dismiss TTP's application. The ALJ granted the motion, holding that: (1) TTP had indeed transferred 50% of its control, and therefore the Commission's rules required dismissal of TTP's application, citing 47 CFR § 73.3572(b); (2) TTP should not be given an opportunity to withdraw its ownership amendment because, despite several opportunities to explain how control would be exercised, TTP had withheld this vital information until the hearing and had not shown any legitimate equities favoring retention of its application in hearing; and, (3) Martin's motion to dismiss was not untimely because it did not know with certainty until hearing how TTP's ownership control would in fact be exercised. Order, paras. 10–13.

4. In its appeal, TTP appears to argue that proper analysis of its change in ownership, particularly the retention of majority equity ownership by Mr. Carney, the limited partner, demon-

strates that no substantial change has occurred.[1] In addition, TTP denies that it withheld information about its partnership structure and control, and claims that Martin's motion to dismiss was filed late without justification. As a result thereof, TTP claims that equity requires that its application be reinstated.

5. *Discussion.* At the outset, we concur with the ALJ that TTP's January 16, 1985 amendment specified a substantial ownership change. Under the former version of Section 73.3572(b) of the Rules, 47 CFR §73.3572(b) (1983), an ownership amendment was classified as "major," requiring return of the application to the processing line for assignment of a new file number and republication of public notice, if the ownership change "would require the filing of an application therefor on FCC Form . . . 315 [the long form applicable to transfers of control]." First Report and Order, *Processing of Broadcast Applications*, 56 RR 2d 941, 945 (1984). Under former Section 73.3572(b), a transfer of control was deemed to occur whenever (1) 50% or more of the voting power of an applicant was being transferred and (2) as a result of the transfer, 50% or more of the voting power would be held by a person, or persons, whose qualifications had not been "passed upon" in a so-called "long form" application. *See Grace Missionary Baptist Church*, 80 FCC 2d 330, 336 (1980). Further, it is well-settled that the Commission will disregard the interests of passive limited partners, who have no actual authority to participate in the management of the applicant, in determining whether a transfer of control has occurred. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981). Clearly, if the former version of the rule were applicable to TTP's 50% transfer of its general partnership interest to Ms. Gooch, a newcomer to the application, the transfer would be regarded as major.

6. The same result obtains under the current version of the rule. Prior to the filing of TTP's application, Section 73.3572(b) was amended to remove the need for applicants to face "multiple

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[1] It is noteworthy that this claim (that TTP's limited partner, Carney, actually controls the partnership and, as a result thereof, no transfer of control occurred on the "B-cut-off" date when Gooch replaced Dilday as a general partner) does not square with Carney's testimony at hearing. Carney, an attorney, appears to clearly testify that he is merely an investor and passive participant — a limited partner. (Tr. 322-371). Unfortunately, either classification of Carney places TTP in an untenable position. Either TTP is a *bona fide* limited partnership controlled by the "general partners," in which case a transfer of control patently occurred on the "B-cut-off" date, or its limited partnership is not authentic and the partnership is 95%-owned and controlled by Carney. In this event, TTP would not be entitled to its claimed credit for 100% ownership integration and enhancements attendant thereto.

forms and unnecessarily complicated policies." *Processing of Broadcast Applications, supra*, 56 RR 2d at 945. The rule now requires the assignment of a new file number only if the ownership amendment "result[s] in a situation where the original party or parties to the application do not retain more than 50% ownership interest in the application as originally filed." 47 CFR §73.3572(b) (1985). In so amending, the Commission intended to liberalize the rule somewhat to permit an *original* minority principal (*i.e.*, less than 50% owner) to achieve majority control without requiring, as formerly, the assignment of a new file number and the reprocessing of the application. However, in the case of transfers to *newcomers* to the application, the Commission did not alter its emphasis on whether a "controlling interest" has been transferred as the test for determining whether ownership changes are "substantial" and thereby invocative of the rule's provisions. *Processing of Broadcast Applications, supra*, 56 RR 2d at 945. Nor has the Commission declared that its focus on *general* partners and *voting* power as determinants of "controlling interests" — as expressed in *Anax* and *Grace Missionary, supra* — has been diminished in the slightest. We therefore conclude that TTP's January 16, 1985 amendment created a substantial ownership change that required the assignment of a new file number, irrespective of its averment that majority *equity* ownership remains in the hands of its sole limited partner.

7. TTP also claims that even if its amendment must be regarded as resulting in substantial ownership change, equity militates against dismissal of its application this late in the proceeding. However, the Commission's holding in *Redwood Television Ministries, Inc.*, 52 RR 1365 (1982), relied upon by TTP in support of its position, is inapposite. In that proceeding the Commission, in reviewing a hearing designation order, held that the then-Broadcast Bureau had erred in rejecting objections directed against an applicant's amendments which resulted in a substantial ownership change. The Commission found that since (1) the post-cut-off date amendments were on file for well over one year, during which time the Bureau raised no question concerning the applicant's ownership, and (2) the Bureau erred in the designation order by rejecting the objections brought by competitors (thereby allowing the applicant to proceed in the erroneous belief that there was no question concerning its ownership), significant equities favored giving that applicant a final opportunity to avoid dismissal. The Commission therefore provided the applicant with the option of amending its application to reflect

retention of control in the hands of original parties to the application. *Id.* at 1369.

8. Conversely, in this proceeding there is no evidence of Commission or Bureau error in processing TTP's application. Indeed, the shortcomings in this case are attributable solely to TTP because its limited partnership agreement and the information concerning its ownership structure that it provided in response to pre-hearing interrogatories contained ambiguities as to how control would be exercised. For example, TTP's limited partnership agreement listed but did not distinguish between the powers of "the Partnership," a term referring collectively to the general and limited partners (Triple J Exh. 6 at 3), and the powers of "the General Partners," a term apparently excluding the limited partners. Some of these powers include the power to manage the proposed television station. *Id.* at 5, 7–9. Other provisions, by contrast, appear to give the general partners sole voting power, except for extraordinary partnership actions. *See id.* at 9–10, 21 *et seq.* Also, because original general partners Dilday and Sperling held equal voting power despite holding unequal (10% v. 2.5%) equity interests, it was not pellucid what voting power Ms. Gooch would have as Mr. Dilday's replacement as general partner (with a reduction to a 2.5% equity interest) despite TTP's assertion in its amendment that all else "remains unchanged." A final example of TTP's pre-hearing lack of clarity in disclosing how its owners would exercise control is its May 6, 1985 response to interrogatories that its limited partner would vote a 95% interest on "partnership matters." Only at hearing and under cross-examination were these ambiguities resolved. It then became evident that the general partners would exercise equal and total voting power, with the limited partner voting only on so-called "extraordinary matters." Two weekis after this matter was thus clarified at hearing, Martin timely filed its motion to dismiss.

9. Under these circumstances, we can find no significant offsetting equities warranting TTP a final opportunity to eviscerate through amendment its substantial ownership change. We concur with the ALJ that, especially in a proceeding such as this, "where the Bureau was processing B cut-off changes from twelve applicants with complicated legal proposals, each applicant had to act in good faith when presenting those changes." Order, para. 11. Indeed, equity in this proceeding now favors the remaining applicants who have complied with the Commission's rules, and the public's interest in the rapid commencement of the first local

television facility at Tequesta, Florida. We stress that the change in ownership was solely of TTP's own making; it had not been misled by any Bureau actions, and the rules governing ownership amendments had been well clarified before its application was filed.[2] We are not unmindful of the harsh fate befalling TTP as a result in our affirmation of the ALJ's Order. However, it is incumbent upon applicants to strictly adhere to the Commission's rules, especially in light of the ever-increasing number of multiparty proceedings and cases involving highly-structured applicants. Here, in an obvious eleventh-hour attempt (Tr. 602-622) to find a new area-resident/general partner (Gooch) to replace the departing moving force/experienced broadcaster (Dilday), TTP set full-sail into the maelstrom. However, in seeking to avoid Scylla, TTP was instead, perhaps as the result of no more than hurried and inartful draftsmanship, sucked into Charybdis by the improper addition of a new 50% voting-control partner.

10. ACCORDINGLY, IT IS ORDERED, that the Appeal filed February 7, 1986 by Tequesta Television Partners Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

ERIC T. ESBENSEN, *Member, Review Board*

Separate Statement
of
Board Member Norman B. Blumenthal

Because I am in complete agreement with the action taken here, I use this occasion solely to expound on a collateral matter raised by the facts in this appeal, the merits of which we need not reach definitively because of the denial of that appeal.

The appellant in this case has been twice structured in a manner in which the putative "limited" partner has owned the overwhelming equity shares in the applicant entity, with the various and sundry "general" partners holding what I consider to be not much more than token equity interests. Thus, under its initial structure, appellant's "limited" partner was shown as having an 87.5% equity interest; at the "B" cut-off amendment, that same so-called "limited" partner's share had ascended to 95%. *See ante* para. 2. The "general" partnership interests have been fractional and split. *Id.*

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[2] *See* 47 CFR §73.3564(b); *compare Garnerlynn Communications*, 58 RR 2d 711 (1985) (Application accepted for processing may later be dismissed should an overlooked substantial defect come to light) *with Grace Missionary*, *supra*, 80 FCC 2d at 337 (Applicant given opportunity to amend away from previously-proposed major ownership change of more than 50% of voting stock because of confusion caused by differing interpretations of former Section 73.3572(b) in three prior Commission cases. Control of the applicant, however, was always in hands of original parties to application.).

Although we proceed these days under the general proposition that a "limited" partner is no more than a "passive investor," while true and actual operational *control* is held by those possessing the responsibilities and prerequisities of "general" partners, *see generally Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981)[1], that proposition is neither infallible nor absolute. For example, even in approving the "limited"/"general" partnership device to help finance minority ownership, the Commission imposed the strict demand that those designated as "general" partners have a minimum of *no less* than a 20% equity interest in the entity to "ensure that complete managerial control over the station's operations is reposed in the ... general partner(s)." *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 855 (1982), *proceeding terminated*, 99 FCC 2d 1249 (1985).

The point here is this: While the Board will credit applicants proposing a "limited"/"general" partnership arrangement according to the general presumption, *see, e.g., Houston Family Television, Ltd.*, 101 FCC 2d 661, 673-674 (1985) (Rev. Bd.) (applications for Comm'n review pending), a fundamental prerequisite to the accreditation of *any* application ownership structure is its underlying *bona fides.* And, where it appears — despite the alleged *de jure* arrangements — that *de facto* control lies in other than the putative controlling parties, the law requires that any tissue-paper veil be pierced. In other words, *Henderson* and *Berryville* remain "good law,"[2] at least in these precincts. *See KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *reversed in part*, 102 FCC 2d 288 (1985) (Comm'n), *appeal pending sub nom. United American Telecasters, Inc.* v. *FCC*, No. 85-1663 *et al.* (D.C. Cir. filed October 15, 1985). Indeed, the Board recently reaffirmed that rejection will follow in any case where there is substantial evidence that a proposed ownership structure is plainly (to use the Commission's term) a "sham" concocted exclusively to garner special or favored agency treatment. *N.E.O. Broadcasting Co.*, FCC 86R-18, released April 4, 1986, at paras. 3-7.

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[1] *See also Corporate Ownership Reporting* (Dkt No. 20521 *et al.*), 58 RR 2d 604, 613-620 (1985) ("limited" partnership interests not cognizable under multiple ownership rules, *provided* that strict safeguards insulate "general" partners from the overriding influence of any "limited" partner(s)).

[2] Respectively, *Henderson Broadcasting Co., Inc.*, 63 FCC 2d 419 (Rev. Bd. 1977); *Berryville Broadcasting Co.*, 70 FCC 2d 1 (Rev. Bd. 1978).

All this is by way of saying that, where empirical, objective, or strong circumstantial evidence suggests a lack of *bona fides* as to a putative ownership structure, the Board will not hesitate to ensure the integrity of the Commission's policies and processes (one of its *core* functions) by giving such questionable applications a thoroughgoing perlustration, surgically separating substance from subterfuge. *E.g., N.E.O., supra; KIST Corp., supra.*

On that basis, I have strong doubts as to whether the instant appellant, had it been reinstated, would have cleared the legal hurdles that its grossly unbalanced ownership structure here prefigured. Somewhere there is a quantitative equity limit on just how far we will permit a purported "limited" partner to go before we will find suspect the claim that the "general" partner(s) retain true *de facto* control. After that point, we will begin to focus closely on the dog itself, and not the tail.

Control, Diversification of
Diversification, of Control of Mass Media

> An applicant's ownership and operation of an existing facility that it seeks to upgrade not considered for diversification purposes because it is difficult to determine if a grant to a newcomer will enhance diversification, because improved service benefits the public, and because a grant to the existing licensee is likely to have only a *de minimis* impact on diversification.
>
> — *Vacationland B/cing Co.*
> BC Docket No. 81-855

FCC 86-200

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
VACATIONLAND BROADCASTING COMPANY, INC. (WFTW-FM) Ft. Walton Beach, Florida	BC DOCKET NO. 81-855 File No. BPH-790518AA
For Construction Permit to Make Major Changes in the Facilities of Station WFTW-FM	
MIRACLE STRIP COMMUNICATIONS, INC. Ft. Walton Beach, Florida	BC DOCKET NO. 81-856 File No. BPH-790509AA
JUANINA, INC. Ft. Walton Beach, Florida	BC DOCKET NO. 81-858 File No. BPH-791114AD

PINNACLE BROADCASTING CORPORATION
Ft. Walton Beach, Florida

BC DOCKET NO. 81-859
File No. BPH-791115AB

DA-GON BROADCASTING COMPANY, INC.
Ft. Walton Beach, Florida

BC DOCKET NO. 81-861
File No. BPH-791115AI

For Construction Permit
for a New FM Station

DECISION

Adopted: April 21, 1986; Released: April 29, 1986

BY THE COMMISSION:

1. Now before us are the above captioned applications to construct a Class C FM Station in Ft. Walton Beach, Florida. Vacationland Broadcasting Company, Inc. (Vacationland) is the licensee of Stations WFTW and WFTW-FM in Ft. Walton Beach. It seeks to improve the facilities of Station WFTW-FM by moving from FM Channel 257A to FM Channel 243C, and it has pledged that it will dispose of its AM station if its application to improve its FM station is granted. Mutually exclusive applications for authority to construct a new station on Channel 243C have been filed by Miracle Strip Communications, Inc. (Miracle Strip), Juanina, Inc. (Juanina), Pinnacle Broadcasting Corporation (Pinnacle), and Da-Gon Broadcasting Company (Da-Gon).

2. In a Decision (97 FCC 2d 485, released April 18, 1984, *recon. denied*, 56 RR 2d 1260, released September 17, 1984) the Review Board affirmed the Initial Decision of Administrative Law Judge Joseph P. Gonzales, granted Vacationland's application to improve the facilities of Station WFTW-FM, and denied the four competing applications for a new FM station. We refused to review the Review Board's Decision, but modified that portion of

the Decision dealing with diversification.[1] The Board had determined that no diversification demerit should be imposed against Vacationland for its ownership and operation of Stations WFTW and WFTW-FM because the grant of its application would "ultimately result in the addition of *two* media voices to" Ft. Walton Beach.[2] In denying review we held that Vacationland's ownership and operation of the AM station could not be considered for diversification purposes since Vacationland had made a firm, pre-hearing commitment to divest itself of Station WFTW. With respect to Station WFTW-FM, we concluded that no demerit was warranted under *Miner* v. *FCC*, 663 F.2d 152 (D.C. 1980), because there was "no evidence that Vacationland [would] continue to operate Station WFTW(FM) if its application is denied or that a newcomer [would be] unlikely to apply for Vacationland's vacated frequency if Vacationland is permitted to upgrade its FM station."[3]

3. The four losing applicants filed Notices of Appeal with the United States Court of Appeals for the District of Columbia Circuit. Information set forth in the brief filed by Juanina indicated that counsel for Vacationland had represented in Limited Exceptions to Initial Decision that Vacationland would continue to operate both stations if its application to improve the facilities of Station WFTW(FM) was denied. Based upon this information, we asked the court to remand the proceeding in *Pinnacle Broadcasting Corporation* v. *Federal Communications Commission* (Case No. 85-1364) so that we could determine what impact should be given to Vacationland's ownership of Station WFTW(FM) under the standard comparative issue in light of counsel's representation. By its Order of December 23, 1985 the Court granted our remand request. On January 10, 1986, the General Counsel, acting under delegated authority, issued an Order (FCC 86I-003, released January 13, 1986) affording the parties an opportunity to file comments addressing the diversification question. Now before us are: (a) Comments, filed February 4, 1986, by Vacationland Broadcasting Company, Inc; (b) Comments, filed January 24, 1986, by Miracle Strip Communications, Inc.; (c) Comments, filed February 4, 1986, by Juanina, Inc. of Ft. Walton Beach; (d) Comments, filed February 4, 1986, by Pinnacle Broadcasting Corporation; (e) Comments, filed February 3, 1986, by

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[1] *Vacationland Broadcasting Co.*, 58 RR 2d 439 (1985).

[2] *Vacationland Broadcasting Co.*, 97 FCC 2d 485, 489 (Rev. Bd. 1984), *recon. denied*, 56 RR 2d 1260 (Rev. Bd. 1984).

[3] *Vacationland Broadcasting Co., Inc., supra*, 58 RR 2d at 441.

Da-Gon Broadcasting Company, Inc.; (f) Reply Comments, filed February 11, 1986, and Erratum thereto, filed February 20, 1986, by Vacationland Broadcasting Company, Inc.; (g) Reply Comments, filed February 11, 1986, by Juanina Inc. of Ft. Walton Beach; (h) Reply Comments, filed February 11, 1986, by Pinnacle Broadcasting Corporation; (i) Motion for Leave to Amend, filed February 28, 1986, by Vacationland Broadcasting Company, Inc.; and (j) Comments on Motion for Leave to Leave, filed March 12, 1986, by Pinnacle Broadcasting Corporation.

II. Proceedings on Remand

4. We have reconsidered our previous action in this case in light of counsel's representation that Vacationland will continue to operate its AM/FM combination if its application to improve the facilities of Station WFTW-FM is denied. However, for the reasons set forth herein, we find that Vacationland's promise to continue operating Station WFTW-FM on Channel 257A if its application to change channel is denied does not affect the comparative evaluation of the applicants. Accordingly, we will grant Vacationland's application for a construction permit to improve the facilities of Station WFTW-FM, Ft. Walton Beach, Florida, condition this grant upon Vacationland's divestiture of all interest in or connection with Station WFTW, Ft. Walton Beach, Florida, and deny the competing applications for a new FM station filed by Miracle Strip, Juanina, Pinnacle and Da-Gon.

5. As an initial matter, we again conclude that Vacationland's present ownership of Station WFTW cannot be considered for diversification purposes. In this regard, Vacationland has made a firm commitment to dispose of its AM station before commencing operation on the improved facilities of Station WFTW-FM. Under established Commission precedent, a media interest is not considered for diversification purposes where a timely and unequivocal promise to dispose of that interest has been made.[4] As we indicated in our May 17, 1985 Order denying review, there is no basis for treating Vacationland's firm commitment to divest itself of all interest in Station WFTW differently than we would any promise by an applicant for a new station to dispose of a media interest. Thus, none of the competing applicants is entitled to any comparative credit under diversification for Vacationland's present ownership and operation of Station WFTW, Ft. Walton

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[4] *WHW Enterprises, Inc.*, 89 FCC 2d 798, 813-14 (Rev. Bd. 1982), *reversed on other grounds, WHW Enterprises, Inc.* v. *FCC*, 753 F.2d 1132 (D.C. Cir. 1985).

Beach.[5] For the same reason, we will not award Vacationland any diversification credit for its proposal to dispose of its AM station.

6. A more difficult question is raised by Vacationland's current ownership and operation of Station WFTW–FM. Reply Comments filed by Vacationland indicate that it does not challenge the representation made by counsel that Station WFTW–FM would continue to operate on Channel 257A if the application to change channels is denied. Thus, a remand to adduce evidence as to Vacationland's intention with respect to Station WFTW–FM is unnecessary. Since Vacationland has confirmed that it would continue to operate on Channel 257A, it appears that the grant of one of the competing applications will immediately increase the absolute number of media voices available in Ft. Walton Beach whereas the grant of Vacationland's application to change channels would not result in an immediate change in media voices. Vacationland urges that no diversification demerit is warranted because there is substantial indication that Channel 257A would not remain vacant if Vacationland were permitted to move the facilities of Station WFTW–FM to Channel 243C. In support of its contention that the grant of one of the competing applicants is not necessary to enhance diversification, Vacationland notes that we refused to reallocate Channel 257A to Crestview, Florida because substantial interrest has been shown for operating on Channel 257A in Ft. Walton Beach and because three applications were subsequently received for Channel 257A in that community. Comments filed by Juanina confirm that "the radio market in the Fort Walton Beach area is highly attractive as well as presently competitive."[6] In view of the foregoing we agree with Vacationland that the grant of any one of the five mutually exclusive applications filed in this case, including that of Vacationland, would ultimately foster diversification of ownership equally well. In this regard, Vacationland would continue operat-

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[5] We must reject Miracle Strip's suggestion that we penalize Vacationland under diversification because it may, under the terms of the divestiture commitment, retain the AM station until the improved FM goes on the air. We do not anticipate that Vacationland, having promised to divest itself of the AM in order to improve its chances of getting FM Channel 243C will delay construction in order to retain its present AM/FM monopoly in Ft. Walton Beach. Furthermore, if Vacationland had lost, it would have retained its monopoly in Ft. Walton Beach during the period of time that the prevailing applicant was constructing the new facilities on Channel 243C.

[6] *See* Comments, filed February 4, 1986, by Juanina, Inc., p.4, where Juanina urges that we take official notice of the number of licensed stations in the area and the numerous applications filed for Class A FM stations that have been assigned to communities which are even smaller than Ft. Walton Beach. *See* Attachment A to Juanina's Comments.

ing on Channel 257A if one of the competing applicants were licensed to operate on Channel 243C, but FM Channel 257A would become available for assignment to a new owner if Vacationland were licensed to operate on Channel 243C.[7] Thus, the absolute number of media owners serving the community of Ft. Walton Beach will be the same regardless of which applicant is licensed to operate on Channel 243C.

7. As the competing applicants contend, however, there may be a delay before a broadcast station could be licensed to operate on the FM channel that Vacationland currently occupies, whereas a grant to one of the competing applicants would immediately increase the number of media voices available in Ft. Walton Beach. Because there appears to be considerable interest in Channel 257A in Ft. Walton Beach,[8] this delay could be exacerbated by the need to hold comparative hearings to select among qualified applicants for FM Channel 257A. Apart from the question of delay, the competing applicants are correct that the grant of Vacationland's application does not, despite the substantial interest in Channel 257A, offer the same assurance as the other applications that this channel would eventually be licensed for operation to a competing voice in Ft. Walton Beach. For the reasons set forth below, however, we deem it inappropriate to penalize Vacationland under the diversification criterion because institution of new FM service on Channel 257A may be delayed by the need to hold a comparative hearing to choose among competing applicants.

[7] Miracle Strip argues that the continued availability of Channel 257A for assignment to another licensee in Ft. Walton Beach cannot be presumed since Channel 257A could always be reallocated to another community. While Miracle Strip is technically correct, it is extremely unlikely, in view of the substantial interest expressed in operating this channel in Ft. Walton Beach when we proposed to reassign it to Crestview, that Channel 257 would be deleted from Ft. Walton Beach. More fundamentally, our efforts to promote diversification of ownership extend beyond the community of license. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-95 (1965). Thus, the availability of an existing licensee's previously occupied frequency for "assignment to a qualified applicant proposing to establish an additional station in [the same community] or proposing to establish a station in a nearby community having a greater need . . . for use of the operating assignment" is relevant in comparative upgrade cases. *Valdosta Broadcasting Co.*, 11 FCC 769, 772 (1946).

[8] *See* notes 6 and 7, *supra*. As Juanina suggests, we take official notice of information in our files concerning the number of applications received for Class A stations in other small communities, and of the number of applications tendered for Channel 257A in Ft. Walton Beach. *See Midwest Television, Inc.* v. *FCC*, 18 RR 2d 2001, 2007-08 (D.C. Cir. 1970).

8. As an initial matter, we believe that comparative upgrade cases, where an existing licensee seeks merely to modify its station by switching channels, and comparative proceedings, where all the applicants seek authority to initiate service, raise somewhat different considerations in terms of diversification. The existing licensee, unlike the ordinary comparative applicant, does not seek an *additional* station. Since the licensee is required to relinquish its existing channel, the grant of its application to change channels would not adversely affect media concentration or otherwise frustrate our efforts to promote diversification of ownership. In recognition of the fact that the grant of an existing licensee's application to change channels would make its previously occupied channel available for assignment to another qualified applicant, we held in *Valdosta Broadcasting Co.*, 11 FCC 769, 773 (1946), that diversification would not be controlling in such cases. Subsequently, however, we adopted the 1965 *Policy Statement* which announced that "[d]iversification is a factor of primary significance" in resolving the standard comparative issue and that media interests in the proposed community of license "will normally be of most significance."[9] In doing so, we carved out no special exception for comparative upgrade cases where one applicant merely seeks authority to modify existing facilities.

9. Noting the significance attached to the diversification criterion, the court warned in *Miner* v. *FCC*, 663 F.2d 152, 157 (D.C. Cir. 1980), that diversification "must be achieved in a way that is fair and does not automatically disadvantage existing licensees who have a record of service in favor of untried newcomers." In that case the licensee of the only two broadcast stations licensed to serve St. George, Utah sought to improve her AM station by moving to a clear channel frequency. We denied review of a Review Board Decision that awarded a substantial diversification preference to the competing applicant for a new station and granted the newcomer's application. *Julie P. Miner*, 60 FCC 2d 892, 898-99 (Rev. Bd. 1976), *review denied*, 67 FCC 2d 1612 (1975). In vacating that decision, the court found that we had not adequately explained our departure from *Valdosta* and that "[we] ha[d] not taken a 'hard look' at the 'salient problem' of equitably fostering competition in the context of mutually exclusive applications such as those filed by Miner and Crain . . . " 663 F.2d at 158.

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[9] *Policy Statement on Comparative Broadcast Hearings*, *supra*, 1 FCC 2d at 394-95.

10. We believe that it is appropriate to take a hard look at this matter in the context of this case. In the only case decided since *Miner*, the Review Board granted the existing licensee's application to change channels and denied the competing application for a new station.[10] Notwithstanding the competing applicants' contention in this proceeding, *Minneapolis Star & Tribune Company* does not support the imposition of a diversification demerit against Vacationland. In granting the existing licensee's application, the Review Board explicitly rejected the argument that a dispositive diversification demerit would be consistent with *Miner* because the existing licensee had stipulated that it would remain on its present channel if its application to change channels was denied. The Board reasoned that a dispositive diversification demerit based solely upon the fact that the licensee already occupied Channel 41 would, contrary to *Miner*, " 'automatically disadvantage' an existing licensee with a record of service in favor of an untried newcomer." 88 FCC 2d at 1607-08. With regard to the question of media concentration, the Board found that the newcomer was entitled to some diversification credit because its proposal offers the certainty of an immediate increase in diversity. Since the potential benefit flowing from the competing applications "rest[ed] entirely on the unsupported assumption that Channel 41 would remain unoccupied," however, the Board found only a slight diversification preference was warranted. In "deference to the *Miner* principles" the Board held that diversification was not controlling and that it was outweighed by other comparative factors. 88 FCC 2d at 1614. This case is stronger than *Minneapolis Star & Tribune Company*. While the grant of one of the competing applications for a new station will offer an immediate increase in diversity in Ft. Walton Beach, significant interest has been expressed in applying for Channel 257A. Consequently, the potential for increased competition in Ft. Walton Beach does not depend to the same degree as it did in *Minneapolis Star & Tribune Company*, upon an assumption as to what would happen to Channel 257A if Vacationland is permitted to switch channels. Thus, any gain in terms of increased media competition from the competing applications in this case is much more ephemeral. Under these circumstances, we conclude that the grant of Vacationland's application should be considered as having only a *de minimis* impact on media concentration in Ft.

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[10] *Minneapolis Star & Tribune Co.*, 88 FCC 2d 1604 (Rev. Bd. 1982), *review dismissed, Cowles Media Co.*, FCC 831-82, released July 20, 1983.

Walton Beach, and that accordingly no diversification demerit should be assessed in this case.

11. Even if there had been no basis for determining whether Channel 257A would remain vacant if Vacationland were permitted to move to Channel 243C, we would not have assessed any diversification demerit against Vacationland in this case. In our view, the public interest would be best served by entirely disregarding for diversification purposes an applicant's interest in a broadcast facility that it seeks to improve, and to the extent that *Minneapolis Star & Tribune Company* indicates otherwise, we explicitly overrule that case. In doing so we are by no means abandoning our efforts to maximize media competition. Our commitment to promoting enhanced diversification of ownership remains paramount. In all comparative licensing proceedings, including those which involve a proposal to improve existing facilities, diversification will continue to be a factor of primary significance. We will calculate diversification credit in comparative upgrade cases based upon all media interests held by any applicant, including the existing licensee, except for the facility that the incumbent licensee proposes to upgrade by changing channels.

12. In creating this very limited exception to our ordinary practice, we are motivated by the evidentiary difficulty of assessing whether a grant to a newcomer will actually enhance diversification on a long-term basis. In this regard, *Miner* indicates that a diversification demerit against the existing licensee based upon its incumbency on the channel which it proposes to relinquish must be supported by record evidence indicating what will happen to both channels depending upon which applicant is licensed to operate on the more desirable channel; and that, as a matter of fairness, the burden of proof with respect to these matters cannot rest exclusively on the incumbent licensee.[11] However, our experience in this and other comparative upgrade proceedings indicates that the information needed to support a diversification demerit against the incumbent licensee may not be readily available, and that probative evidence as to the likelihood of additional service being instituted on the channel currently occupied by the existing licensee and of the existing licensee being willing and able to continue operating on its original frequency may be difficult, if not impossible, to adduce.[12] The protracted evidentiary hearings required to explore

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[11] *Miner* v. *FCC*, *supra*, 663 F.2d at 157–58.

[12] *See James E. Reese*, 45 FCC 2d 315, 324 (Rev. Bd. 1974), where the Review

these matters are inconsistent with the need to inaugurate a new service on a channel allocated to the community at the earliest possible time. Despite the significant public interest benefits of ownership diversification, we do not believe that the potential for enhanced diversification in these cases is sufficient to justify this delay.

13. More fundamentally, imposing even a slight diversification demerit against the existing licensee based solely upon its incumbency on a frequency that it will relinquish erects an almost insurmountable barrier against that licensee in the context of a comparative proceeding. Since "[d]iversification is a factor of primary significance" in choosing among qualified applicants,[13] an existing licensee seeking to upgrade its broadcast facilities would need more than a slight preference under best practicable service in order to overcome the newcomer's automatic advantage under diversification.[14] A licensee that is aware of the severe handicap that it would face in a comparative upgrade proceeding has little incentive to pursue innovative ways to improve its service to the public, such as the assignment of a technically superior frequency to the community. Yet improved broadcast service benefits the public as well as the broadcaster, and we have sought to encourage licensees to maximize their existing facilities in order to improve service to the public.[15] In light of our policy of encouraging such improvements, we find it anomalous to thwart a licensee's efforts to improve its existing facilities by penalizing the licensee for its current ownership and operation of broadcast facilities that it seeks to maximize. Automatically penalizing an

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Board characterized an inquiry into the likelihood of the existing licensee's frequency remaining vacant as "an exercise into the realm of surmise and speculation."

[13] *Policy Statement on Comparative Broadcast Hearings*, *supra*, 1 FCC 2d at 394-5. A licensee seeking to change channels does not have the option of avoiding a demerit by pledging to dispose of the station altogether, as is true in the case of other media interests of an applicant seeking an additional station.

[14] *See Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 469-70 (1982), where we indicated that a diversification advantage outweighs an integration advantage of equal importance but may be outweighed by a more significant integration advantage. *See also Communications Properties, Inc.*, 92 FCC 2d 45, 51 (Rev. Bd. 1982), *review denied*, FCC 83-320, released July 7, 1983.

[15] *See Report and Order in Docket No. 83-1148)*, 98 FCC 2d 916 (1984), where we amended our rules to permit the modification of FM or TV licenses in rulemaking proceedings in certain situations; *Second Report and Order in Docket 84-231*, 101 FCC 2d 638 (1985), *recon. denied*, FCC 86-76, released February 21, 1986, where we amended our rules to provide comparative preferences to daytime-only AM licensees who propose to divest themselves of all interest in the AM station.

existing licensee with a record of service to the public in this manner effectively relegates the licensee to operating forever on its original frequency regardless of the availability of technically superior frequencies. Such an approach has no justification in today's highly competitive market where newcomers need not be shielded from competition with established broadcasters in order to survive. This is especially true in this case since FM frequencies are allocated based upon the demonstrated demand of a particular community.

14. While we believe that an existing licensee's efforts to improve its broadcast facility benefit the listening public and should not be discouraged, we do not go so far as to hold, as we did in *Valdosta*, that an existing licensee should be preferred over a competing applicant for a new station based upon its past service to the community of license. Since the incumbent licensee has the option of continuing to operate on its original channel if its application to change channels is denied, grant of a competing application will not necessarily interrupt the continuity of service to the public. Thus, we will not award the existing licensee any comparative advantage or otherwise accord it any improvement expectancy[16] based upon its record of service in the community, comparable to the renewal expectancy that we award a renewal applicant for a substantial record of service to the community.[17] We hold only that we will not penalize an existing licensee that seeks to improve its broadcast facility by changing channels under the diversification criterion for its ownership and operation of the station that it proposes to upgrade.[18] By this means we seek only to assure an existing licensee with a record of community service equal opportunity to compete with a newcomer for a technically more desirable channel. We do so because in such cases the advantage in terms of increased media competition from the grant of a competing application for a new station may be only temporary, because the impact of such an ephemeral increase

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[16] *See Minneapolis Star & Tribune Co.*, 88 FCC 2d 1604, 1610 (Rev. Bd. 1982), *review dismissed, Cowles Media Company*, FCC 83I-82, released July 20, 1983, where the Review Board correctly held that a special improvement expectancy was not due the existing licensee, because loss of its service was not at issue in the case and because the licensee was not seeking renewal of its license.

[17] *See Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683 F.2d 503 (1982), *cert. denied*, 460 U.S. 1084 (1983), where we held that a licensee with a substantial record of service to the community deserves a renewal expectancy that may be sufficient to overcome a challenger's advantages under diversification and integration.

[18] We will not disregard for diversification purposes any station owned and operated by the existing licensee that does not propose to upgrade.

in media competition on our efforts to enhance diversification of ownership would, at most, be *de minimis*, and because the existence of a more permanent diversification advantage can only be considered speculative and difficult to evaluate. Under these circumstances, we conclude that considering an applicant's incumbency on a frequency it proposes to vacate, for diversification purposes, would not serve the public interest because it thwarts the efforts of an existing licensee with a demonstrated commitment to serving the community to take advantage of technical innovations enabling it to better serve the public and because the competing applicants' proposals offer no greater assurance of a meaningful increase in the number of available media voices.

15. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to Amend, filed February 28, 1986, by Vacationland Broadcasting Company, Inc. IS GRANTED, and the attached amendment IS ACCEPTED.[19]

16. IT IS FURTHER ORDERED, That the application of Vacationland Broadcasting Company, Inc. (File No. BPH-790518AA) for authority to vacate Channel 257A and to move the operation of Station WFTW(FM) to Channel 243C in Ft. Walton Beach, Florida IS GRANTED; and that the applications of Miracle Strip Communications, Inc. (File No. BPH-790509AA), Juanina, Inc. (File No. BPH-791114AD), Pinnacle Broadcasting Corporation (File No. BPH-791115AB), and Da-Gon Broadcasting Company (File No. BPH-791115AI)[20] for authority to construct a

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[19] Vacationland seeks leave to amend its application to report that Vacationland's President, Wilbur R. Powell, executed a general power of attorney appointing his son, Rodney R. Powell, his attorney-in-fact. The amendment states that Mr. Powell is currently recuperating from a broken hip and that the power of attorney was executed because he is physically unable to sign his name due to his arthritis. Comments filed by Pinnacle suggest that Vacationland's petition for leave to amend raises serious questions as to whether Mr. Powell's integration proposal is capable of effectuation. Without determining whether the scope of the remand in this proceeding would permit us to explore these matters, we find nothing in the pleadings or in the tendered amendment, which affirmatively states that Wilbur Powell continues to exercise control over Stations WFTW and WFTW(FM) despite his temporary absence due to the hip injury, that would require us to reevaluate the credit due Vacationland for Wilbur Powell's proposed participation. Accordingly, we accept Vacationland's amendment for reporting purposes only.

[20] Comments filed by Da-Gon suggest that we take this opportunity to recalculate the comparative credit for the proposed participation of its minority stockholder in the management of the station. Our established practice is to consider minority ownership under best practicable service, rather than diversification. *See WPIX, Inc.*, 68 FCC 2d 381 (1978). This case is now before us on remand so that we can reevaluate our diversification analysis in light of Vacationland's apparent willingness to continue operating on FM Channel 257A. In view of the

new FM station on Channel 243C in Ft. Walton Beach, Florida ARE DENIED.

17. IT IS FURTHER ORDERED, That the grant of Vacationland's application IS SUBJECT to the following condition:

> Prior to commencement of the improved facilities authorized herein, Vacationland Broadcasting shall certify to the Commission that it has divested itself of all interest in, and connection with, Station WFTW(AM), Ft. Walton Beach, Florida.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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limited scope of the remand, we deem it inappropriate to expand our inquiry to include other matters.

Obscenity
Past Performance
Renewal, Applicant v. New Applicant
Subscription TV

Commission rules renewal expectancy standard for STV operation is same as for conventional broadcast operation. Commission declines to consider allegations STV operator carried obscene programming and leaves obscenity determinations to local officials in first instance.

—*Video 44, Chicago, Illinois*

MM Docket No. 83-575

FCC 86-167

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Re Applications of	
Harriscope of Chicago, Inc., *et al.* a Joint Venture, d/b/a VIDEO 44	MM DOCKET NO. 83-575 File No. BRCT-820802J9
For Renewal of License of Station WSNS-TV, Channel 44 Chicago, Illinois	
and	
MONROE COMMUNICATIONS CORPORATION Chicago, Illinois	MM DOCKET NO. 83-576 File No. BPCT-821101KH
For a Construction Permit	

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1986; Released: April 16, 1986

BY THE COMMISSION:

1. Before the Commission are: (1) a Memorandum Opinion and Order by the Review Board, FCC 85R-74, released September 5, 1985;[1] (2) Applications for Review and Motions for Leave to File Applications for Review filed October 1, 1985 by Video 44 (Video) and Oak Industries, Inc. (Oak), Oppositions thereto filed October 16 by Monroe Communications Corporation (Monroe), and Comments in Support of [Video's] Application for Review filed October 16 by the Mass Media Bureau; (3) a Petition to Intervene filed October 3 by Oak[2]; (4) an Application for Review and a Motion for Leave to File Application for Review filed October 7 by Monroe, an Opposition thereto filed October 22 by Video, and a Reply filed October 31, by Monroe; and (5) a Motion to Strike [Monroe's Reply] filed November 6 by Video.

I. BACKGROUND

2. In this comparative renewal proceeding, Video seeks renewal of its license to operate Station WSNS-TV, Channel 44, Chicago, Illinois, and Monroe has filed a mutually exclusive application for a construction permit. Administrative Law Judge Joseph Chachkin (ALJ) denied Video's application and granted Monroe's.[3] The ALJ found that towards the end of the 1979-82 license term, at issue here, Video evolved from a conventional television operation to almost full time subscription television (STV) operation,[4] with no local and virtually no news or public affairs programming. Holding that this latter performance was most probative, the ALJ gave Video no renewal expectancy.[5] In the

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[1] *Video 44*, 58 RR 2d 1537 (Rev. Bd. 1985).

[2] Oak has a 49% interest in Video, and a 50% interest in the subscription television operator using Video's broadcast facilities, and is the supplier of programming relevant to this proceeding. By FCC 85M-4575, released November 22, 1985, the Presiding Judge permitted Oak to intervene in this proceeding. Accordingly, we will dismiss Oak's Petition to Intervene filed with the Commission as moot.

[3] FCC 85D-11, released February 21, 1985.

[4] In the STV mode, the signal is scrambled so that only paying subscribers supplied with a decoder can receive the programming.

[5] Under current Commission policy, the renewal expectancy consists of a preference awarded incumbent licensees with records of substantial past performance. This preference is weighted against other comparative factors and is generally entitled to more weight. *Cowles Broadcasting, Inc.*, 86 FCC 2d 993, 1012-13 (1981), *affirmed sub nom. Central Florida Enterprises, Inc.* v. *FCC*, 683

absence of a renewal expectancy, Monroe's advantages over Video for integration of ownership into management and diversification of media control proved decisive.

3. On appeal, the Review Board questioned the ALJ's treatment of the renewal expectancy issue. The Board held that Commission precedent provided insufficient guidance as to the appropriate renewal expectancy standard applicable to STV operations.[6] Accordingly, the Board certified to the Commission the following question: whether the past performance of an incumbent subscription television licensee should be judged by the same renewal expectancy standards as conventional broadcast stations?

4. The Board also noted that, in its Brief, Monroe had claimed that adult oriented programming broadcast by Video was indecent. While the Board found that the concept of indecency did not apply to scrambled STV programming presented late at night,[7] it believed that the record contained prima facie evidence that the programming in question was obscene and violated 18 U.S.C. § 1464.[8] In particular, the Board relied on Monroe's Exhibit 8, a description of the film *Pandora's Mirror*, broadcast by Video, which indicated that virtually the entire film is devoted to sexual acts and related activities. Hence, the Board added an obscenity issue against Video and remanded the proceeding to the ALJ for further hearings.[9]

II. RENEWAL EXPECTANCY

5. In its Application for Review[10] Monroe argues that there is

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F.2d 503 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 1774 (1983).

[6] The Board noted that substantial performance for conventional broadcast stations is ordinarly measured by such factors as licensee ascertainment of community needs and problems; licensee programming responsive to those ascertained needs and problems, including a quantitative and qualitative evaluation of its nonentertainment programming; the extent of public support or complaints; and Commission Rule violations. STV programming, in contrast, usually consists of such entertainment offerings as movies, sports events, and specials.

[7] Under *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), the concept of indecency in conventional broadcasting is related to the accessibility of such programming to children.

[8] Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

[9] The Commission stayed these hearings pending consideration of the matters discussed herein. FCC 86-16, released January 8, 1986.

[10] Ordinarily the Commission does not entertain interlocutory appeals of Review Board actions. Section 1.115(e)(1) of the Commission's Rules. However, since the Board's certification Order has put the merits of this matter before the Commission, we will consider Monroe's pleading.

no need for Commission guidance as to the renewal expectancy standard applicable to STV operations, since existing precedent is adequate to resolve this question. According to Monroe, existing precedent clearly states that an STV operator has the same obligations as a conventional broadcaster to present nonentertainment programming responsive to community needs and interests. Thus, in Monroe's view, the renewal expectancy standard applicable to an STV operator is the same as that for a conventional broadcaster.

6. Video responds by reciting its arguments made below that STV is a unique service that is intended to serve the public interest in novel ways. For example, Video notes Commission policy statements describing types of programming, such as first run movies, which would more likely be presented on a subscription basis than by conventional means. In other words, Video claims that its entertainment as well as nonentertainment programming is relevant to the renewal expectancy in question. Additionally, Video observes that the Commission has recently adopted a Notice of Proposed Rulemaking expressing a preliminary judgment that STV should not be treated as a broadcast service.[11] Video suggests, therefore, that STV operations should be under no obligation to present the type of nonentertainment and local programming upon which the renewal expectancy of a conventional broadcast operation is evaluated and that the renewal expectancy for an STV operation should be treated differently from that of a conventional broadcast operation.

7. We generally agree with the position taken by Monroe and the ALJ. Although our approach to STV may be modified in the future, our existing views as to the responsibilities of STV operators has been set forth in various policy statements which we have issued over the years. Several pertinent aspects of these statements are discussed by the ALJ in his Initial Decision.[12] In particular, we stated in *Subscription TV Service:*[13]

> . . . [A]n STV licensee will be expected to continue to meet its obligation to program in response to community needs. No reasons were offered by commenters or are evident to us to indicate that STV and conventional

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[11] *Subscription Video Services*, FCC 85-538, released January 8, 1986.

[12] FCC 85D-11, at paras. 81-87.

[13] 90 FCC 2d 341, 353-54 (1982). That Report and Order repealed a prior requirement that STV operators must present a minimum of 28 hours a week of conventional programming. The 28 hour Rule was established by *Subscription Television*, 15 FCC 2d 466, 522-26 (1968), in which we held that STV programming was intended to supplement rather than replace a station's conventional operation.

> licensees should have different obligations in this area. However, we believe that the public interest will be better served if this basic obligation is fulfilled with the least government intrusion and with the most licensee flexibility. Therefore, we will allow an STV broadcaster to meet its programming responsibilities with either scrambled or conventional programming. In fact, permitting the former will allow the development of new types of non-entertainment programs designed for select audiences willing to pay for such broadcasts (narrow-casting). In our view, greater diversity in responsive programming will result from an STV licensee's option to meet its programming responsibilities by conventional or scrambled means.

We further stated:[14]

> STV permittees, like other television permittees, are required to ascertain the community's needs, problems and interests and propose programs to meet these needs when applying for a license. Similarly, licensees must ascertain needs when applying for renewal. The action taken herein[15] in no way affects this basic ascertainment requirement.

As these statements indicate, while we have accorded STV licensees latitude in meeting their programming responsibilities with conventional or scrambled programming, we have not defined these basic responsibilities or the public interest considerations they reflect differently for conventional and STV operators. On the contrary, we have declined to scrutinize the desirability of a particular station's carrying STV programming and instead left the decision of whether or not to carry STV programming to the licensee's discretion and the marketplace.[16] It follows therefore that in evaluating whether an STV operator's past performance merits a renewal expectancy, the standards applied should be essentially the same for an STV operator as for a conventional licensee. We do not mean to suggest that any rigid formula should be mechanically applied in evaluating either conventional or STV operators. Rather, we mean only that the same underlying factors are relevant in either case.

III. OBSCENITY

8. Video, Oak, and the Mass Media Bureau criticize the Board's

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[14] 90 FCC 2d at 358 n. 27.

[15] That action abolished the requirement that STV operators conduct formal ascertainment procedures relative to the entertainment aspects of their programming. In proposing to eliminate this requirement, we noted that it was inconsistent with our practice of avoiding scrutiny into the entertainment aspects of conventional stations. *Subscription TV Service*, 90 FCC 2d 341, 357 (1982).

[16] *Subscription TV Program Rules*, 85 FCC 2d 631, 637 (1981).

action adding an obscenity issue in this proceeding.[17] These parties contend that the Commission should not undertake to determine in the first instance whether programming is obscene. They point out that under the applicable Supreme Court precedent, *Miller* v. *California*,[18] obscenity is a matter of local community standards,[19] which, in their view, the Commission is ill-equipped to determine. Both Video and the Bureau also fault the Board for relying on Monroe's description (Monroe's Exhibit 8) of *Pandora's Mirror* without allowing additional opportunity for the parties to dispute Monroe's characterization of the film's contents. Video claims that the Board relied solely on the fact that the film contained sexually explicit material without seriously addressing the *Miller* criteria, or, apparently, viewing the actual film. Oak also argues that questions of obscenity should be considered only in criminal and not administrative proceedings.

9. Monroe responds that under established precedent the Commission has concurrent jurisdiction to examine allegations of obscene programming by a broadcaster in the first instance and that the Commission has recognized competence to apply the *Miller* standards in administrative proceedings. Additionally, Monroe maintains that its Exhibit 8, describing *Pandora's Mirror* was legitimately introduced into evidence under a general past programming issue and that Video had a full opportunity at that time to dispute Monroe's characterization of the film's contents. Monroe also contends that its characterization accurately reflects the film's nature and clearly constitutes a prima facie description of obscene programming.

10. We will delete the obscenity issue added by the Board. We agree with Monroe, that in the past the Commission has exercised concurrent jurisdiction to enforce § 1464 by applying the administrative sanctions of, *inter alia*, § 312 of the Communications Act of 1934, as amended, where allegations have been made that broadcast programming was obscene.[20] However, upon reflection,

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[17] As previously noted, the Commission does not ordinarily review interlocutory actions of the Review Board. Here, the Commission granted review *sua sponte* by FCC 86-16, released January 8, 1986. We will therefore consider the pending pleadings relevant to this matter.

[18] 413 U.S. 15 (1973).

[19] Under *Miller* the applicable criteria are: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by an applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

[20] *WGBH Educational Foundation*, 69 FCC 2d 1250, 1253-54 (1978). The

we believe that it would be appropriate for us to exercise greater restraint in this area. We believe that the Commission should not attempt to determine in the first instance whether material is obscene, but rather, should defer to local authorities.

11. Our concern in this area arises from the First Amendment ramifications of the obscenity question. Obscene material is not protected speech under the First Amendment,[21] whereas material which is not obscene, even if sexually explicit, is protected speech. Consequently, a failure to exercise restraint presents the threat of serious intrusion into the First Amendment rights of licensees and the public.

12. In formulating its obscenity criteria, the Supreme Court anticipated that determinations would be made by local juries based on their familiarity with local community standards.[22] Obviously, no such mechanism could be applied in Commission proceedings. While the Supreme Court did provide for alternative means to determine community standards, if necessary, such as the use of expert witnesses,[23] we believe that, in the context of Commission proceedings, these would be highly burdensome and of dubious reliability.[24] In particular, we are concerned that this could lead to taking an unduly restrictive view of adult oriented programming. As we have previously recognized, adult programming is a common feature of subscription services,[25] as it is indeed a feature of local movie theaters and videocassette services. In Commission licensing proceedings, opponents of a licensee's renewal application, for example a mutually exclusive applicant, may well have a strong incentive to raise allegations of obscenity, even where no parallel concern exists in the local community itself.

13. Accordingly, we believe it would be desirable to rely on local prosecutors to recognize situations in which a perceived threat to local community standards actually exists. In our view, such an approach will serve both to protect the Commission's

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Commission's independent authority vis-a-vis § 1464 was upheld by *Illinois Citizens Committee for Broadcasting* v. *FCC*, 515 F.2d 397, 403-06 (D.C. Cir. 1975).

[21] *Miller* v. *California, supra* at 23.

[22] *Hamling* v. *United States*, 418 U.S. 87, 104-06 (1974); *Miller* v. *California, supra* at 30-34.

[23] *Hamling* v. *United States, supra* at 106, 108; *Miller* v. *California, supra* at 31 n. 12.

[24] The Supreme Court has itself noted the undesirability of resorting to expert testimony in obscenity determinations. *Paris Adult Theater I* v. *Slaton*, 413 U.S. 49, 56 n. 6 (1973).

[25] *Subscription TV Service, supra* at 345.

processes from unproductive litigation and to give appropriate deference to the expertise of local community officials in recognizing the ability of their communities to tolerate diverse and arguably offensive programming. In cases where a licensee has been convicted of violating § 1464 the Commission would take appropriate action.[26] Thus, although the Board reasonably construed existing precedent, we will delete the obscenity issue.

14. ACCORDINGLY, IT IS ORDERED, That the Applications for Review and Motion and Request for Leave to File Applications for Review filed October 1, 1985 by Video 44 and Oak Industries, Inc. ARE GRANTED; that the Memorandum Opinion and Order of the Review Board, FCC 85R-74, released September 5, 1985 (58 RR 2d 1537) IS REVERSED to the extent indicated in paragraphs 11-14 *supra*; that the issue added by that Memorandum Opinion and Order IS DELETED; and that the hearing specified by the Memorandum Opinion and Order IS TERMINATED.

15. IT IS FURTHER ORDERED, That the Application for Review and Motion for Leave to File Application for Review filed October 7, 1985 by Monroe Communications Corporation ARE GRANTED to the extent indicated herein; and the question certified by the Board IS ANSWERED in the affirmative.

16. IT IS FURTHER ORDERED, That the Motion to Strike filed November 6, 1985 by Video 44 IS GRANTED and the Reply filed October 31, 1985 by Monroe Communications Corporation IS STRICKEN.[27]

17. IT IS FURTHER ORDERED, That the Petition to Intervene filed October 3, 1985 by Oak Industries IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

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[26] *See Character Qualifications in Broadcast Licensing*, 59 RR 2d 801 (1986).

[27] Replies to oppositions to applications for review are prohibited unless requested. Section 1.115(f) of the Commission's Rules; *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 876 (1976).

Rules, Waiver of, Denied
Television, Low Power

> **A request for waiver of the rule limiting peak visual transmitter output power for VHF low power television and television translator stations to 10 watts was properly denied. Permittee requesting authority to operate at 100 watts made no showing that interference to other stations would not occur from its proposal and advanced no reason why its situation presented an extraordinary circumstance that made waiver of the rule in the public interest.**
> ***Ware Communications, Inc.***

FCC 86-140

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Request of

WARE COMMUNICATIONS, INC.
(K09SS)
Channel 9, Flagstaff, Arizona

For Waiver of Section 74.735(a)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1986; Released: April 7, 1986

BY THE COMMISSION:

1. The Commission has under consideration an "Application for Review" and a "Petition to Accept Late-Filed Pleading" filed by Ware Communications, Inc. ("Ware"), permittee of authorized low power television station K09SS, Channel 9, Flagstaff, Arizona. Ware urges review of Mass Media Bureau ("Bureau") actions denying Ware's request for waiver of Section 74.735(a) of the Commission's Rules, which limits low power television or television translator stations operating on unassigned channels in the VHF band (Channels 2-13) to 10 watts peak visual transmitter

output power, and denying Ware's petition for reconsideration of that action. Ware seeks permission to operate K09SS at 100 watts peak visual output power.

2. Ware's low power television construction permit application for Channel 9, Flagstaff, Arizona (File No. BPTVL-810331JA) was granted on March 30, 1982. The authorized station was given call sign K09SS.[1] Ware applied for, and was granted, 10 watts peak visual transmitter output power, the maximum permitted under then--existing Commission rules. Ware filed its request for waiver to permit an increase in the authorized transmitter output power of K09SS from 10 watts to 100 watts in May 1982.

3. The Bureau denied Ware's request by letter on June 23, 1983, stating that its request proposed a major change in facilities pursuant to Section 73.3572(a) of the Commission's Rules; that although Ware claimed at least 100 watts were needed to provide satisfactory service to Flagstaff, it failed to submit even an engineering showing to support its 100-watt proposal; and that Ware did not articulate any reason why its situation presented an extraordinary circumstance which warranted the rule waiver as in the public interest.

4. Ware petitioned for reconsideration, and advanced two arguments. It stated that since its waiver request was filed before June 17, 1982, the effective date of the new rules governing the low power television and television translator service,[2] the rule there adopted limiting low power television and television translator stations to 10 watts peak visual power should not apply to its station. Additionally, Ware argued that the public interest would be served by grant of the waiver, since Ware's increased coverage would better enable it to compete in the marketplace and to provide service to the entire community of Flagstaff, which Ware characterized as underserved by off-air television. The Bureau denied reconsideration, stating that Ware's waiver request was indeed subject to the 10-watt limitation of Section 74.735(a) of the Rules, that Ware's desire to increase its coverage would not benefit the public interest, and that Ware still had not shown any extraordinary circumstances to justify its waiver request.

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[1] The construction permit application was tendered originally in the name of Seattle Community Television, Inc. The corporation's name was later changed to Ware Communications, Inc. The permittee will be referred to throughout as "Ware" for clarity.

[2] *Low Power Television Service*, 51 RR 2d 476 (1982) ("*LPTV Report and Order*").

5. The Bureau denied Ware's petition for reconsideration on October 31, 1983. Consequently, if Ware intended to file an application for review of the Bureau's actions, it was required to do so by December 1, 1983, 30 days after November 1, 1983, the day after the letter denying reconsideration was dated and mailed. *See* Sections 1.4 and 1.115(d) of the Commission's Rules; *see also Neighborhood TV Company, Inc. (Channel 53, Peoria, Illinois, et al.)*, FCC 85-594, released November 8, 1985, at para. 7. However, Ware did not file its application for review until January 12, 1984; it was thus 42 days late. By way of explanation for this tardiness, Ware states in its concurrently filed "Petition to Accept Late-Filed Pleading" only that "Through inadvertence, a response to the [Bureau's] denial [of reconsideration] was not filed." Since Ware has not shown good cause why its pleading should be considered as timely filed, it will be dismissed as defective. However, we will consider Ware's contentions on an informal basis in an effort to assure that the rules and policies involved are generally understood.

6. While Ware attacks the Bureau's denial of its waiver request, it also claims that the rule section from which it seeks a waiver, Section 74.735(a), is either inapplicable or, alternatively, unreasonable. Before proceeding to the merits of the waiver request, we will first address those latter contentions.

7. Ware first asserts that "due process considerations" require the 10-watt VHF power limitation of Section 74.735(a) to be found inapplicable in this case since it was adopted after the grant of Ware's construction permit application and the filing of its waiver request. However, this argument is irrelevant, as VHF low power television and television translator stations operating in Arizona were limited to a maximum of 10 watts peak visual transmitter output power even before the conclusion of the low power television rulemaking proceeding. As noted in our low power television *Notice of Proposed Rulemaking*, 82 FCC 2d 47, 67 (1980), the rules in effect prior to the formal institution of the low power television service provided that VHF low power television or television translator stations were permitted a peak visual power of 1 watt east of the Mississippi River and 10 watts west of the Mississippi River. *See* 47 CFR Section 74.735 (1981). The 1982 low power television rulemaking amended the rules to allow all VHF low power television and television translator stations to operate at a maximum of 10 watts, except if the station operates on a channel assigned for full service television in Section 73.606 of the Rules, the Television Table of Assignments, in which case

100 watts peak visual transmitter output power is permitted. Channel 9, on which K09S is authorized, is not assigned to Flagstaff. Therefore, regardless of whether the old or new rules apply, Ware's request for operation at 100 watts makes necessary a waiver of the 10-watt power limitation.[3]

8. Ware next challenges the VHF power limitation rule itself, arguing specifically that the distinction between permitting 100-watt operation on vacant assigned VHF channels while limiting operation to 10 watts on unassigned VHF channels is unreasonable. However, the general validity of that rule is not properly challenged when an exception to it is sought. Ware's objections are relevant only in a rulemaking context. Indeed, this matter was addressed in that context; we thoroughly explained the rationale behind the rule in the low power television rulemaking proceeding. *See LPTV Report and Order*, *supra* at 491–2, 498–9; *Reconsideration of LPTV Report and Order*, 53 RR 2d 1267, 1274 (1983).

9. Finally, Ware states that waiver of the 10-watt power limitation would be in the public interest in this case so that K09SS might reach more of Flagstaff. Ware characterizes Flagstaff as "a small community which has only one local television outlet." Ware essentially contends that the public interest would be furthered by grant of its waiver request since operation of K09SS at 100 watts, a power ten times greater than the 10 watts for which it is currently authorized, would enable it to compete more effectively with the only local full service television station and thus preserve an alternative local television service for Flagstaff.

10. We disagree, and affirm the Bureau's denial of Ware's waiver request. Initially, Ware contends that K09SS could operate with 100 watts peak visual power without interfering with any other station. However, Ware did not submit any engineering studies to support that claim before the Bureau, and has not done so here. Additionally, it has never tendered an application to detail its proposed modification of K09SS or even attempted to describe with particularity the nature of the proposed changes. Its assertion that no interference would be caused by the operation of

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[3] Ware claims that many low power television and television translator stations granted before the conclusion of the low power television rulemaking operate at variance with the final rules for the service. However, we note that Ware fails to point out any situation where we granted a low power television or television translator application during the interim period at a peak visual transmitter output power greater than that permitted by either the old *or* new rules.

K09SS at 100 watts is thus conclusory and unsubstantiated.[4]

11. Moreover, we note that Ware's stated ground for waiver of the 10-watt power limitation rule is inadequate. Ware claims that the public interest would be served by grant of the requested waiver because permitting the power increase would enable it to compete more effectively and to provide service to an area which, it delcares, is served only by one full service television station. However, this characterization of the paucity of locally originating television service in Flagstaff is inaccurate. Commission records indicate that Flagstaff is served presently by full service television station KNAZ-TV and low power television station K05HT, as well as by television translator stations K131JI, K60BP, K62BA, K64BI and K66BS. Additionally, two new services have been authorized in Flagstaff — full service television station KKTM(TV) and low power television station K28AQ. It is expected that these new stations will begin operating within the next year. Flagstaff will then be served by two full service television stations and two low power television stations in addition to Ware's K09SS, as well as by five television translator stations, which could at any time begin local origination.[5] Consequently, Ware has not shown that its situation presents any extraordinary circumstances so as to make waiver of the 10-watt power limitation in the public interest.

12. Based on the foregoing discussion, we believe that the Bureau fully considered and properly decided the matter. Therefore, Ware's application for review will be dismissed.

13. Accordingly, IT IS ORDERED, That pursuant to Section 1.115 of the Commission's Rules, the "Petition to Accept Late-Filed Pleading" IS DENIED; and the "Application for Review" filed by Ware Communications, Inc., IS DISMISSED as untimely, and when considered informally, IS DENIED.

14. IT IS FURTHER ORDERED, That the Mass Media Bureau send a copy of this *Memorandum Opinion and Order* by

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[4] In this connection, we observe that an increase in the authorized visual output power of K09SS to expand its coverage area would also constitute a major change in facilities. *See* Section 73.3572(a)(1)(v) of the Commission's Rules. The Commission's current low power television and television translator application procedures prohibit the filing of major change applications except during a filing window announced by public notice. *See* Section 73.3572(f)(1) of the Rules.

[5] Section 74.732(e) of the Commission's Rules provides that any television translator station may begin to originate programming upon notification to the Commission.

Certified Mail — Return Receipt Requested to the applicant named herein.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

Comparative Hearing
FM Station, Authorization
Pleadings Frivolous

Review Board summarily affirmed ID's grant to FM applicant with media diversification and ownership integration preferences. No meaningful Sec. 307(b) choice of communities. Exceptors chided for frivolous appeal. Counsels' signature on exceptions certifies to best of their knowledge, information, and belief there are good supporting grounds and exceptions were not interposed for delay, 47 CFR 1.52.
—*Warmac Communications, Inc.*
MM Docket No. 83-1223

FCC 85R-75

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WARMAC COMMUNICATIONS, INC. Springfield, Florida	MM DOCKET NO. 83-1223 File No. BPH-820927AF
BIBLE BROADCASTING SYSTEMS, INC. Springfield, Florida	MM DOCKET NO. 83-1224 File No. BPH-830215AF
MARTIN INTERMART, INC. Springfield, Florida	MM DOCKET NO. 83-1225 File No. BPH-830215AG
BETTY F. MARTIN Callaway, Florida	MM DOCKET NO. 83-1227 File No. BPH-830215AI

For Construction Permit
for a New FM Station

Appearances

Howard W. Simcox, Jr. and *George R. Borsari, Jr.*, on behalf of Warmac Communications, Inc.; *C. Michael Norton*, on behalf of Bible Broadcasting Systems, Inc.; *Gary S. Smithwick*, on behalf of Martin Intermart, Inc.; and *Matthew H. McCormick*, on behalf of Betty F. Martin.

DECISION

Adopted: September 4, 1985; Released: September 6, 1985

BY THE REVIEW BOARD: MARINO (CHAIRMAN), JACOBS, AND BLUMENTHAL.

BOARD MEMBER JACOBS:

1. This was a lightly-contested five-party FM comparative broadcast proceeding, in which four applicants still remain. The case was designated for hearing by Hearing Designation Order, 48 Fed. Reg. 51857, published November 14, 1983, and 16 months later, after a four-hour evidentiary hearing and 173 pages of transcript, presiding Administrative Law Judge (ALJ) John M. Frysiak issued a 12-page Initial Decision (I.D.) which granted the application of Betty F. Martin (Martin).[1] He concluded that there were insufficient Section 307(b) choice of communities and, instead, he awarded media diversification and ownership integration preferences to Martin, which made her the "clear winner" on a choice-of-applicants comparative basis. I.D., paras. 54, 63–65, 67.

2. All of the losing applicants have filed exceptions to the I.D., and oral argument was held on July 26, 1985. The Board has carefully considered the I.D. in light of these presentations and our examination of the record. We adopt the ALJ's findings of fact and conclusions of law as a full and accurate reflection of the record evidence, Commission policy, and case precedent, and summarily affirm his conclusion that grant of Martin's application will best serve the public interest, convenience, and necessity.

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[1] FCC 85D-17, released March 26, 1985.

3. Only two exceptions require any attention. See Section 1.282(b)(2) of the Commission's Rules, 47 CFR 1.282(b)(2).[2] Warmac Communications, Inc. and Bible Broadcasting Systems, Inc. (Bible) urge that the community of Springfield deserves a Section 307(b) preference over Callaway because of alleged "significant and substantial differences" favoring Springfield. The ALJ fully addressed the superficial distinctions proffered, I.D., paras. 6–11, 51–54, and we agree that they are insufficient to garner a Section 307(b) preference. *Compare DuPage County Broadcasting, Inc.*, 19 FCC 2d 250, 255, 17 RR 2d 229, 236 (Rev. Bd. 1969) (preference awarded based on "disproportionally greater" civic, social, commercial, and industrial factors), *and Cosmopolitan Enterprises, Inc.*, 15 FCC 2d 650, 655, 14 RR 2d 1029, 1034 (Rev. Bd. 1968) (preference requires "sufficient differences . . . to permit a meaningful ... choice"), *with Charles Vanda*, 4 FCC 2d 655, 659, 8 RR 2d 427, 434 (Rev. Bd.), *rev. denied*, FCC 66-1013 (Comm'n 1966) (no preference awarded where Section 307(b) differences "not enough ... to be decisive"). Second, Bible and Martin Intermart, Inc. question Martin's 100% full-time ownership integration proposal (and the "clear preference" that it received) as unlikely to be effectuated, because it is based on her "bare representation and promise" to leave her present profession of nurse anesthetist which she has held for some 30 years. However, the exceptors offer only speculation and surmise to compensate for their lack of rebuttal evidence at hearing and unavailing cross-examination of Ms. Martin. These are wholly inadequate grounds to upset the ALJ's conclusion. *See Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 596, 51 RR 2d 1478, 1487 (Rev. Bd. 1982), *rev. denied*, FCC 83-415 (Comm'n 1983), *aff'd per curiam sub nom. Blake-Potash Corp.* v. *FCC*, Case No. 83-2112 (D.C. Cir. April 26, 1985).

4. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed by Betty F. Martin on March 29, 1985, by Martin Intermart, Inc. on April 16, 1985, and by Bible Broadcast-

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[2] At oral argument, the exceptors were chided for prosecuting this appeal because it appeared to be "a nothing case" in which "the arguments are really non-decisional" or frivolous. See Tr. 216–18. Subsequent analysis has confirmed this initial judgment, and the prompt emergence of broadcast service in the Springfield — Callaway area has suffered. We remind counsel in this proceeding — and throughout the adjudicatory process — that under Section 1.52 of the Commission's Rules, 47 CFR 1.52, an attorney's signature on any brief or pleading constitutes a certificate that to the best of his knowledge, information, and belief there is good ground to support it and that it has not been interposed for delay. This stricture applies even to appeals as of right, such as the instant proceeding.

ing Systems, Inc. on April 19, 1985 ARE GRANTED, and the amendments ARE ACCEPTED.

5. IT IS FURTHER ORDERED, That the motion to strike filed by Bible Broadcasting Systems, Inc. on June 3, 1985 IS DENIED; and

6. IT IS FURTHER ORDERED, That the application of Betty F. Martin (File No. BPH-830215AI) for authority to construct a new FM broadcast station at Callaway, Florida IS GRANTED, and the applications of Warmac Communications, Inc. (File No. BPH-820927AF), Bible Broadcasting Systems, Inc. (File No. BPH-830215AF), and Martin Intermart, Inc. (File No. BPH-830215AG) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

FCC 85D-17

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
WARMAC COMMUNICATIONS, INC. Springfield, Florida	MM DOCKET NO. 83-1223 File No. BPH-820927AF
BIBLE BROADCASTING SYSTEMS, INC. Springfield, Florida	MM DOCKET NO. 83-1224 File No. BPH-830215AF
MARTIN INTERMART, INC. Springfield, Florida	MM DOCKET NO. 83-1225 File No. BPH-830215AG
BETTY F. MARTIN Callaway, Florida	MM DOCKET NO. 83-1227 File No. BPH-830215AI
For Construction Permit for a New FM Station	

Appearances

Phyllis Whitten and *George Borsari* on behalf of Warmac Communications, Inc.; *C. Michael Norton* on behalf of Bible Broadcasting Systems, Inc.; *Gary S. Smithwick* on behalf of Martin Intermart, Inc.; *Matthew H. McCormick* on behalf of Betty F. Martin and *Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: March 20, 1985; Released: March 26, 1985

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Warmac Communications, Inc., ("WCI"); Bible Broadcasting Systems, Inc. ("BBS"); Martin Intermart, Inc. ("MII"), for a construction permit for a new commercial FM broadcast station, Channel 278C, allocated to Springfield, Florida, and the application of Betty F. Martin ("Martin") for a construction permit for a new commercial FM broadcast station on Channel 278C at Callaway, Florida.[1]

2. The Hearing Designation Order, released November 10, 1983, designated for hearing the following issues:

> 1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicants would constitute a hazard to air navigation: WCI, BBS, MII, Martin.
>
> 2. To determine: (a) the areas and populations which would receive primary aural service (1 mV/m or greater in the case of FM) from the proposals and the availability of other primary service to such areas and populations, and (b) in light thereof and pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio services.
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> 3. To determine, in the event that it is concluded that a choice between the applicants should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, best serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. In addition, WCI and MII were required to submit environmental impact information as described in Section 1.1311 of the Commission's Rules. Both have done so by separate filings made on December 7, 1983.

4. Issue 1, hazard to air navigation, was resolved in favor of WCI, BBS, MII and Martin by *Order*, (FCC 84M-452), released January 27, 1984.

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[1] The application of Werner Wortsman, et al. (File No. BPH-830215AH, MM Docket No. 84-1226) was dismissed by *Memorandum Opinion and Order*, FCC 84M-1716, released April 9, 1984.

5. A prehearing conference was held in Washington, D.C. on January 13, 1984. A hearing was held in Washington, D.C. on outstanding issues on June 12, 1984, at which time the record was closed. Proposed Findings of Fact and Conclusions of Law were filed on August 8, 1984 and Replies thereto were filed on August 31, 1984.

Findings of Fact

307(b) Issue

6. Springfield and Callaway both are located in Bay County, Florida (WCI Ex. 9, p. 1). Callaway abuts Springfield at its western border. Springfield has a land area of 3.0 square miles; Callaway, 5.3 square miles (Martin Ex. 2, p. 1).

7. The 1980 U.S. Census listed Springfield's total permanent population at 7,220 persons and Callaway's at 7,154 persons (WCI Ex. 9, p. 1; MII Ex. 5; Martin Ex. 2, p. 1). The 1982 estimated population for Springfield was 7,554 and for Callaway 7,681 (U.S. Department of The Treasury Central Revenue Sharing Allocation Estimates, p. 144). The 1983 estimated population for Springfield was 7,445 and for Callaway 8,882 (Florida Estimates of Population, April 1, 1983, p. C–7).

8. Both Springfield and Callaway are each governed by an elected mayor and a city commission comprised of 4 elected members (WCI Ex. 9, p. 1; Martin Ex. 2, p. 1). Both communities have full-time police and fire protection. Springfield, in addition, has its own jail facilities (4 cells) (WCI Ex. 9, p. 3; Martin Ex. 2, p. 2; Tr. 79).

9. All schools within Bay County are under the jurisdiction of the Bay County School District. The school board is elected on a county-wide basis. Students from Callaway attend Everitt Junior High School and Rutherford High School, both located in Springfield. Callaway Elementary School is one block outside of Callaway's city limits. Shaw Vocational School, operated by the Bay County School District also is located at Rutherford High School (Tr. 76–77; WCI Ex. 9, p. 2; Martin Ex. 2, p. 2). Gulf Coast Seminary is located in Springfield but the record gives no indication of its enrollment or its accreditation, if any (Tr. 78–79).

10. Springfield has a city-owned Health Center staffed by a private medical doctor (WCI Ex. 9, p. 2). A branch of the Bay County Health Department is also located in Springfield (WCI Ex. 9, p. 2).

11. Springfield has four parks; Callaway owns and operates two city parks (WCI Ex. 9, p. 1–3; Martin Ex. 2, p. 2). A branch of the Bay County Library is located in Springfield. Callaway is served by the weekly visits from the Bay County Book Mobile (WCI Ex. 9, p. 2–3).

Comparative Coverage

12. The areas and populations within the 1.0 mV/m contour which will receive aural service in addition to the proposed facilities of WCI, BBS, MII, and Martin have been stipulated, in the joint engineering stipulation, as follows:

	Area (sq. mi.)	*Population*
WCI	2,843	123,463
BBS	2,522	122,415
MII	2,505	121,228
Martin	2,784	123,449

13. During the daytime, the number of available primary aural services within the uncommon areas ranges from two to five or more. At night, it ranges from one to five or more. The following tabulation sets forth the areas and populations which receive such existing services in the uncommon areas proposed to be served by the applicants.

Existing	*Daytime*		*At Night*	
Services	*Area (sq. mi.)*	*Population*	*Area (sq. mi.)*	*Population*
WCI:				
one	0	0	10	59
two	1.24	27	81	311
three	32.4	98	86	1,361
four	11.2	39	121.4	848
five or more	28	48	52	447
BBS:				
one	0	0	0	0
two	0	0	9.3	124
three	0	0	22.4	565
four	0	0	24.2	287
five or more	12.4	8	0	0

MII:

one	0	0	0	0
two	0	0	19.3	17
three	0	0	0	0
four	9.3	15	0	0
five or more	18.7	21	0	0

MARTIN:

one	0	0	7	71
two	8.1	27	64	236
three	23.7	55	75	1,261
four	1	nil.	118	761
five or more	1.9	nil.	50.4	360

Contingent Standard Comparative Issue

Warmac Communications, Inc.

14. WCI is a Florida corporation. The voting stock is held by Jennifer Warren (33%), Rick Warren (8%), Sid McDonald (51%), and Jack Ray Register (8%) (WCI Ex. 1).

15. *Jennifer Warren*. Mrs. Warren, a female Caucasian, is the president and a director of WCI (WCI Ex. 1). She resides at Blountstown, Florida (Tr. 25), a community within the 1.0 mV/m contour of the proposed station (WCI Exs. 2 and 3). She will move to Springfield, Florida in the event the WCI application is granted (WCI Ex. 3). She has no other ownership interest in any medium of mass communications (WCI Ex. 8). She will be fully integrated into the day-to-day management and operation of the station, devoting over 40 hours per week to her sole employment as station manager at the proposed facility (WCI Ex. 3).

16. The commercial radio broadcast experience of Mrs. Warren includes positions over a 5-year period at WKMK, Blountstown, Florida; KXLR, Little Rock, Arkansas; and WBHT, Huntsville, Alabama. Mrs. Warren has been responsible for programming, promotions, advertising, hiring, interviewing, public affairs, and has been an on-air announcer (WCI Ex. 2, p. 1). Her community involvements include being a member of the Initial Planning Council for the Blountstown Civic Center, a judge for the Future Farmers of America/Farm Bureau Talent Beauty Pageant, judge for Blountstown Cheerleader Selection, and a publicity director for the 1984 Health Fair of Calhoun City (WCI Ex. 2, p. 2).

17. *Rick Warren*. Rick Warren is the secretary-treasurer of WCI (WCI Ex. 1; Tr. 52). He resides in Blountstown, Florida which is

within the coverage area of the proposed station (WCI Ex. 4, p. 1; Ex. 5, Tr. 52). Should the WCI application be granted, he will move to Springfield, Florida (WCI Ex. 5). He holds no ownership interest in any broadcast station or other medium of mass communications (WCI Ex. 8).

18. He and his wife own and operate the Swift Print Shop in Blountstown, Florida and publish an advertising shopper, "The Trader" (WCI Ex. 4, p. 2; Tr. 29-30). They will sell the business in the event the WCI application is granted and devote full-time attention to the station (WCI Ex. 4, p. 2). Mr. Warren will be integrated as a full-time sales manager. He has vast broadcast experience gained over a span of seventeen years (WCI Ex. 4, p. 1-2).

19. *Jack Ray Register*. Mr. Register is not proposed to be integrated into the management and operation of the proposed station. He has no mass communications ownership interests (WCI Ex. 8; Joint Stipulation 1).

20. *Sid McDonald*. Mr. McDonald is Chairman of the Board but will not be integrated into the management and operation of the proposed station. He is president, director and 99.98% stockholder in the Brindlee Mountain Broadcasting Corporation, licensee of WCRQ-FM, Arab, Alabama. He also is president and director of BMTC Systems, Inc. (a wholly-owned subsidiary of Brindlee Mountain Telephone Company) which has a pending application for a low power television station in Arab, Alabama on Channel 11 (WCI Ex. 8). Arab, Alabama is approximately 300 air miles from Springfield, Florida (Joint Stipulation 1). WCI proposes to install an auxiliary power source (WCI application, Section IV, p. 6).

Bible Broadcasting Systems, Inc.

21. BBS is a Florida not-for-profit corporation. The affairs of BBS are managed by a Board of Directors. The Board of Directors of BBS is elected by the Board of Directors of Faith Christian Fellowship of Panama City Beach, Florida (FCF) (BBS Ex. 1). The Board of Directors of FCF has agreed that if the construction permit for the proposed station is granted to BBS, it will at that time name the following persons to BBS' Board of Directors, to wit: Pat Gray York, Michael Gene Sasser, Ruth Nobles Sasser, Mark Bishop, Scarlett S. Bishop, Ellen Marie Henderson, Jane Kirby Lamoncia, Howard J. Writtings, Robert Burton Rose (BBS Ex. 1, 3-8 and July 15, 1984, amendment to BBS application). Of the nine proposed directors to BBS, six will

be integrated into management and operation of the proposed station.

22. *Pat Gray York.* Mrs. York, a Caucasian female, resides in Panama City Beach, Florida, approximately 30 miles from Springfield, Florida (BBS Ex. 3, p. 1), and within the coverage area of the proposed station (Joint Engineering Stipulation, Fig. 1–3). She belongs to the First Baptist Church in Panama City Beach, and in the past was a Sunday School teacher and Chairman of the Personnel Committee for the church (BBS Ex. 3, p. 3). She has no interests in any broadcast facility, cable television facility, or daily newspaper (BBS Ex. 3, p. 3).

23. Mrs. York is the vice president as well as a director of BBS. If its application is granted, she will be employed more than 30 hours per week as executive producer, responsible for news and public affairs programming. She would not longer work full-time as a bookkeeper at the sandwich shop she and her husband currently operate in Panama City (BBS Ex. 3, p. 1).

24. From 1959 until 1980, Mrs. York was employed at a commercial television broadcast station. She worked at WBRC, Birmingham, Alabama from 1959 to 1978, as staff announcer, weather anchorperson, talk show hostess, reporter, and writer. While at WBRC she received the Associated Press Radio-TV Award for a children's news program, and the Heart Fund Citation for services and support for the Heart Committee (BBS Ex. 3, p. 2). Mrs. York was a weather anchorperson from WMBB-TV, Panama City, Florida from 1979 to 1980 (BBS Ex. 3, p. 2).

25. *Michael Gene Sasser.* Michael Sasser is the proposed general manager and will be employed more than 30 hours per week. He is a resident of Panama City Beach, Florida. Mr. Sasser is a graduate of Florida State University, with a degree in Mass Communications (BBS Ex. 4, p. 1).

26. Mr. Sasser was sports director of radio station WDLP(AM), Panama City, Florida from 1975 to 1977. From 1979 to the present, Mr. Sasser has been sports director of WJHG-TV, Panama City.

27. Ruth Nobles Sasser. Ruth Sasser, an Hispanic female, and a director and secretary of BBS, resides in Panama City Beach, Florida (BBS Ex. 5, p. 1). She is a member of the Cove Baptist Church, where she also teaches Sunday School (BBS Ex. 5, p. 3). Mrs. Sasser has no interests in any other broadcast stations, pending FCC application, daily newspaper or cable television system (BBS Ex. 5, p. 3).

28. Mrs. Sasser proposes to work more than 30 hours per week as program director of the proposed station (BBS Ex. 5, p. 1). She attended Gulf Coast Community College majoring in Mass Communications (BBS Ex. 5, p. 1). She worked part-time as an announcer and newscaster for WKGC-FM in 1977. In 1978, she was employed full-time as an announcer and for commercial production at WGNE AM/FM, Panama City (BBS Ex. 5, p. 2). Also in 1978, Mrs. Sasser worked for WONS(AM) and WBGM-FM, Tallahassee, Florida as a full-time announcer and for commercial production. From 1979 to 1983, she was employed at WPFM-FM as an announcer, in commercial production, writing copy, dealing with advertisers and doing public affairs work. Since July 1983, Mrs. Sasser has done free-lance commercial production in Panama City (BBS Ex. 5, p. 2).

29. *Ellen Marie Henderson*. Ms. Henderson is a Black female, member of the Board of Directors and treasurer of BBS. She resides at Panama City, Florida and is 20 years old (BBS Ex. 7, p. 1). She has no other interests in any broadcast station, FCC application, daily newspaper or cable television system (BBS Ex. 7, p. 2).

30. Ms. Henderson proposes employment as an on-air announcer and will act as a liason between the station and the Black community, with a time commitment to the station of more than 30 hours per week (BBS Ex. 7, p. 1). She will relinquish her position as treasurer, as well as her current part-time employment at WMBB (TV) and WPFM-FM, in the event of grant.

31. She is enrolled in the Mass Communications Program at Gulf Coast Community College and is in her second year (BBS Ex. 7, p. 1). For the past year and one-half, Ms. Henderson has been employed at WMBB(TV) working approximately 30 hours per week and working part-time on weekends as an announcer at WPFM-FM, Panama City. From 1980 to 1982, she worked part-time at WJOE(AM), Port St. Joe, Florida as an on-air announcer.

32. *Jane Kirby Lamonica*. Ms. Lamonica is a Caucasian female, a resident of Panama City and will work more than 30 hours per week at the proposed station and will be in charge of promotions, with specific duties to manage and direct sales and promotion efforts of the station (BBS Ex. 6, p. 1).

33. At the present time, Ms. Lamonica is sales person for WPFM-FM in Panama City, a position she has held for approximately 1-1/2 years. From 1976 to 1980, Ms. Lamonica worked at WMBB(TV) in Panama City, working as traffic manager and sales

person. If the BBS application is granted, Ms. Lamonica will resign her position at WPFM-FM prior to assuming her position at the proposed station.

34. *Robert Rose.* Robert Rose is a Black male, a resident of Lynn Haven, Florida and will be employed at the station on a part-time basis (25 hours per week), as an announcer and coordinator for the "Bible School" for the proposed station. "Bible School" will consist of national and local ministry program planned to be broadcast between 9 a.m. and 2 p.m. on each weekday (BBS Ex. 8, p. 1).

35. Mr. Rose currently broadcasts a Sunday morning program on radio station WPCF(AM) in Panama City Beach, which he has produced for a period of approximately 2 years (BBS Ex. 8, p. 1–2). Mr. Rose is a minister of the Spoken Word Church of Jesus Christ and has been active in various types of outreach programs in the Black community in the Panama City area (BBS Ex. 8, p. 1–2). He has no interest in any broadcast station, pending FCC application, or any daily newspaper or cable television system.

36. None of the non-integrated directors: Marcus Quinn Bishop; Scarlett S. Bishop, Howard J. Writtings have any other media interests. BBS proposes to install an auxiliary power source (BBS Ex. 2).

Martin Intermart, Inc.

37. MII is a Florida corporation, which is wholly-owned by James E. Martin, Jr., who is president and sole director. David L. Cobb is secretary-treasurer (MII Ex. 1).

38. MII has no other existing broadcast interests. James E. Martin, Jr. is 78% stockholder, president and director of Radio St. Augustin, Inc., licensee of WMKM-FM, St. Augustine, Florida; 100% stockholder, president and director of Radio Intermart Corporation, a 75% joint venturer in Andrews-Intermart Broadcasting Company-A Joint Venture permittee of WQSC-FM, Andrews, South Carolina (MII Ex. 2, p. 1). WQSC has been assigned to Andrews-Intermart Broadcasting Corporation of which Mr. Martin is president and 75% stockholder (Amendment of June 28, 1984, FCC Order 84M–3199, released July 9, 1984). Mr. Martin is 2.3% stockholder in Crown Broadcasting Corporation which holds 49% of the stock of Malrite of Jacksonville, Inc., licensee of WAWS(TV), Jacksonville, Florida (MII Ex. 2, p. 1).

39. David L. Cobb is secretary-treasurer of Radio St. Augustin, Inc., Radio Intermart Corporation and Jemco Communications, Inc. (MII Ex. 2, p. 2).

40. James E. Martin, Jr. proposes not to be employed or integrated in management at the proposed station (MII Ex. 3).

41. MII proposes to install an auxiliary power source (MII Ex. 4).

Betty F. Martin

42. Betty F. Martin will be the sole proprietor and general manager of the proposed station. If her application is granted, she will leave her present employment and will work at the station a minimum of 40 hours per week (Martin Ex. 1, p. 3).

43. For the past twelve years, Ms. Martin has resided in Panama City. Her home is approximately 7 to 8 miles from Callaway and within the primary service contour of the proposed station (*Id.* p. 1)

44. Ms. Martin is a graduate-nurse and took post graduate courses in anesthesia at DePaul Hospital in Norfolk, Virginia during 1956-1957. She also has taken Health Education courses at the University of West Florida's Extension Campus in Panama City. From 1967 to 1972 she lived in Tallahassee, Florida and was employed as a nurse at Tallahassee Memorial Hospital (*Id.* p. 1).

45. From 1972 to 1978 she was employed at the Bay Medical Center in Panama City as a nurse anesthetist. From 1978 to 1979 Ms. Martin served as administrator of Weems Memorial Hospital in Apalachicola, Florida (*Id.* pp. 1-2). The hospital had 28 beds and 45 to 50 employees (Tr. 135-136).

46. During the time she was employed in Apalachicola she continued to reside in Panama City. Since 1979, Ms. Martin has been employed full-time as a nurse anesthestist at Bay Medical Center in Panama City (Martin Ex. 1, p. 2).

47. Apart from her employment duties at Bay Medical Center, Ms. Martin sits on a committee that selects students for a school affiliated with the Medical Center and on a committee that audits the quality of care at the hospital. She devotes approximately 8 hours per year to the selection committee and 25 to 30 hours per year to the auditing committee. Also, on occasion she has lectured at local area public schools regarding health care (Tr. 151-54).

48. In approximately 1978, Ms. Martin owned an ice cream shop in Callaway. She managed the shop, supervised four employees and handled all the bookkeeping. After about 6 months of operation, she moved the business from the space she was leasing in Callaway to a building she owned in Panama City

Beach. About six months after that relocation, she sold the business (Martin Ex. 1, p. 2).

49. Ms. Martin also owns and manages two rental properties in the Panama City area. One is a commercial building in Panama City Beach, the other is a parcel of land which she leases to a billboard company on a yearly basis (*Id.*)

50. Although Ms. Martin is considering relocating her resident to Callaway in case of grant, no firm committment has been made (*Id.*, p. 1, Tr. 168).

Conclusions of Law

307(b) Issue

51. Whenever applicants propose different communities of license for their broadcast stations, but would operate on the same frequency, under Section 307(b) the Commission must first compare the radio needs of the respective communities to determine whether a "fair, efficient, and equitable distribution of radio service" substantially favors one community over the other. If so, only applicants specifying the "favorite" community are given further consideration (See *WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982), *rev. denied*, FCC 83-368 (released September 15, 1983)); *Pasadena Broadcasting Co.*, v. *FCC*, 555 F.2d 1046 (D.C. Cir. 1977). In other words, a Section 307(b) issue is dispositive only if the record reflects "sufficient differences between the proposal to permit a meaningful 307(b) choice" (*Cosmopolitan Enterprises, Inc.*, 15 FCC 2d 650, 14 RR 2d 1029 (Rev. Bd. 1968).

52. In resolving a Section 307(b) issue, the Commission looks to both the needs of the communities involved for a transmission service and the needs of the populations to be served for a reception service (*Congaree Broadcasters, Inc.*, 42 FCC 2d 683 (Rev. Bd. 1973); *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640 (Rev. Bd. 1973). The Commission's priorities with respect to distribution of FM service are as follows: (1) first full-time aural service (i.e., service to "white" areas); (2) second full-time aural service (i.e., service to "gray" areas); (3) first local service; and (4) other public interest matters. See *Second Report and Order, FM Channel Policies/Procedures*, 90 FCC 2d 88, 51 RR 2d 807 (1982), *recon. denied*, 56 RR 2d 448 (1984).

53. Here, none of the applicants will provide a first service to any "white" areas. At night, only WCI and Martin will provide service to "gray" areas. Specifically, Martin will provide a second

service to 71 persons in 7 square miles; WCI will provide a second service to 59 persons in 10 square miles. While service to these small gray areas is not to be totally disregarded, this case clearly cannot turn on such small differences. Accordingly, the most important factor remaining is the provision of first local service.

54. In searching for significant differences among communities, the Commission evaluates a number of factors including the communities' population and growth rate as well as their commercial, governmental and cultural attributes (*Resort Broadcasting Company, Inc., supra.* It is undisputed that Springfield and Callaway, although adjacent, are distinct communities with separate local governments and governmental services. However, an analysis of these communities reveals no significant differences. Their populations, as of the 1980 Census, were nearly equal. Springfield's population was listed as 7,220 versus 7,154 for Callaway. Although Martin has cited 1982 and 1983 estimates which came to show a greater growth rate for Callaway, these estimates cannot be fully credited because they were not made for census purposes, but rather for economic and budgeting purposes. Both communities have full-time police and fire protection. Schools servicing each community are under the jurisdiction of the Bay County School District, the school board being elected on a county wide basis. Both communities are serviced by a library system county owned. Neither community has a newspaper originating in its own locality. Springfield has two more parks than Callaway but the record does not indicate their respective sizes. Springfield also has a four-cell jail and city-owned health center which is staffed by a private medical doctor. These differences are not deemed to be significant. It is ruled that neither community is entiled to a preference under the 307(b) issue.

Contingent Comparative Issue

55. In its *Policy Statement On Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the Commission explained that there are two primary objectives toward which its comparative analysis of mutually exclusive applications should be directed; the best practicable service to the public and the maximum diffusion of control of the media of mass communications.

Diversification of Control of the Mass Media

56. Neither Betty Martin nor BBS principals have media interests. WCI must be attributed with Sid McDonald's almost

complete ownership of Station WCRQ-FM, Arab, Alabama. Of lesser significance is Jennifer and Rick Warrens' ownership of the Trader, whose circulation is partly in the proposed service area. MII's 100% owner is also the president, director and 78% stockholder of the licensee of WMKM-FM, at St. Augustine, Florida. Additionally, he owns 75% of the permittee of Station WQSC(FM), Andrews, South Carolina. He also owns a small interest in the licensee of Station WAWS-TV, Jacksonville, Florida. In sum, Martin and BBS both gain significant diversification preferences over MII and moderate diversification preferences over WCI. WCI is entitled to a slight preference over MII.

Best Practicable Service

57. *Warmac Communications, Inc.* WCI proposes the full-time integration of Jennifer Warren, a 33% stockholder and Rick Warren, a 8% stockholder. WCI's integration proposal is enhanced by the local residence of Mr. and Mrs. Warren; Mrs. Warren's civic involvement and female status[2] and Mr. and Mrs. Warren's broadcast experience.

58. *Bible Broadcasting Systems, Inc.* In the event of a grant, BBS proposes for integration into management and operation six of its nine directors for a total integration of control of 66-2/3%. Five directors propose to work more than 30 hours per week and one proposes weekly part-time employment of 25 hours. The Commission applies a 40 hour standard for full-time integration. *Peoples Broadcasting Corp.*, 53 RR 2d 1210 (Rev. Bd. 1983); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (Rev. Bd. 1981). In *L.B. Wilson, Inc.*, 37 FCC 511 (1964), the Commission expressly held that a commitment of 30 to 35 hours per week "and additional time if needed" even if fully creditable would not establish full-time employment. BBS, therefore, is entitled to 55.55% substantial time credit and 11.11% part-time credit for the integration of its six directors. This integration is enhanced by local residence, civic activities, 44.44% female status and 33.33% minority status.[3]

59. *Martin Intermart, Inc.* MII has stipulated that it is not seeking credit for integration of ownership and management.

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[2] In *Horne Industries, Inc.*, 54 RR 2d 249 (Rev. Bd. 1983), the Review Board stated that the general threshold for awarding any significant comparative qualitative enhancement for integrated minority ownership should be set at more than 50% (or otherwise controlling) interest level; a lower level of integrated minority ownership maybe decisional in otherwise deadlock cases. The 50% threshold applies also to female ownership.

[3] See footnote 2, *supra.*

60. *Betty F. Martin*. Martin is entitled to 100% quantitative integration credit. Her integration is qualitatively enhanced by her female status and local residence.

Auxiliary Power

61. WCI, BBS, MII each propose auxiliary power equipment and are each entitled to a preference over Martin who does not propose to use such equipment.

Comparative Coverage

62. The differences in the total areas and populations to be served by the applicants are not significant. The WCI and Martin propose more service to underserved areas both in daytime and nighttime. BBS would serve some underserved areas at night. Accordingly, WCI and Martin are entitled to a slight preference for comparative coverage, while BBS deserves a very slight preference for serving some underserved areas at night.

Ultimate Conclusions

63. Based on the foregoing, the preferences among the applicants are as follows: on the 307(b) issue, neither community is entitled to a preference as the community of license.

64. On the diversification criteria, BBS and Martin are entitled to a moderate preference to a significant preference over MII; WCI is entitled to a slight preference over MII.

65. On the integration criteria, Martin has 100% full-time integration, WCI 41% full-time integration, BBS 55.55% substantial time and 11.11% part-time (moderate) integration and MII proposes no integration of ownership. Consequently, Martin is entitled to a clear preference without regard to any other comparative factors. See *New Continential Broadcasting Co., supra*, where a 12.5% quantitative difference was held to be "clear".

66. On the auxiliary power criteria, WCI, BBS and MII are entitled to a slight preference over Martin.

67. As to the areas and populations served, WCI and Martin are entitled to a slight preference for comparative coverage, while BBS deserves a very slight preference for serving some underserved areas at night. In light of this foregoing analysis, Betty F. Martin is the clear winner and will be awarded the grant.

68. Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Betty F. Martin (File No. BPH-830215AI) for a construction permit to build and operate a new FM broadcast station on Channel 278C at Callaway, Florida IS GRANTED and the applications of Warmac Communications, Inc. (File No. BPH-820927AF); Bible Broadcasting Systems, Inc. (File No. BPH-830215AF) and Martin Intermart, Inc. (File No. BPH-830215AG) ARE DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION

JOHN M. FRYSIAK, *Administrative Law Judge*

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[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

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